

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,) Criminal Case No.
) 1:17-cr-00027-JPJ-PMS-1
vs.)
)
JOEL A. SMITHERS,)
)
Defendant.)

TRANSCRIPT OF JURY TRIAL - DAY 6
HONORABLE JUDGE JAMES P. JONES PRESIDING
MONDAY, MAY 6, 2019

A P P E A R A N C E S

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Proceedings taken by Certified Court Reporter and transcribed
using Computer-Aided Transcription

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Official Court Reporter for the U.S. District Court Western District of Virginia

INDEX

PLAINTIFF'S WITNESSES:

PAGE

DEENI BASSAM

DIRECT EXAMINATION BY MR. RAMSEYER	5
CROSS-EXAMINATION BY MR. WILLIAMS	88

DEFENSE WITNESSES:

PAGE

BRENDA M. FISHER

DIRECT EXAMINATION BY MR. WILLIAMS	117
CROSS-EXAMINATION BY MR. LEE	123
REDIRECT EXAMINATION BY MR. WILLIAMS	143
RECROSS EXAMINATION BY MR. LEE	146

LENNIE HARTSHORN, JUNIOR

DIRECT EXAMINATION BY MR. WILLIAMS	148
RECROSS-EXAMINATION BY MR. RAMSEYER	156

EXHIBITS

MARKED

RECEIVED

ON BEHALF OF THE PLAINTIFF:

SB-2 -	Steve Blevins patient file	4
JMay-3	Jerry Maynard patient file	4
DR-	Text messages between Joel	4
1000 -	Smithers and Deborah Reynolds	
74 -	Photo - notice re restrooms	4
107 -	Pharmacy Chart-signed	25

1 (Proceedings commenced at 9:05 a.m.)

2 THE COURT: Good morning, ladies and gentlemen. Are
3 we ready to proceed?

4 MR. RAMSEYER: We are, Your Honor. I have one thing
5 I want to bring to the Court's attention.

6 THE COURT: Yes, sir.

7 MR. RAMSEYER: There's an initial appearance next
8 door in the *Indivior* case that I was going to cover, if the
9 Court would allow me to break for that, and that's at 10:30.

10 THE COURT: Yes, sir.

11 MR. RAMSEYER: Thank you.

12 THE COURT: Yes, sir, Mr. Williams.

13 MR. WILLIAMS: Your Honor, my client has presented
14 me with something that I just -- it was just handed to me.
15 I'd ask to present it to the Court.

16 THE COURT: All right. If you'll hand it to me,
17 please.

18 The statement from Mr. Smithers signed by him says
19 that the Court is biased against him and "has shown bias
20 against my person in my case" and requests that I withdraw
21 from the case.

22 And I will have the clerk file this. The motion
23 will be denied.

24 Are we ready for the jury?

25 We'll have the jury in.

1 (Proceedings held in the presence of the jury.)

2 THE COURT: Good morning, ladies and gentlemen.
3 Hope you had a good weekend. We're ready to go again. And
4 the Government may call its next witness.

5 MR. RAMSEYER: Your Honor, before I do that, I'd
6 like to introduce -- move to introduce two pieces of evidence.
7 I inadvertently forgot to ask the Court, or did not ask the
8 Court to introduce Government's Exhibit SB-2, which is a
9 fragment of the Steve Blevins file. And JMay, M-a-y, 3, which
10 is a fragment of the Jerry Maynard file. And I'd also move to
11 introduce Government's Exhibit DR-1000, which are the text
12 messages relating to Deborah Reynolds that Mr. Lee and the
13 agent talked about on Friday -- or Thursday, excuse me. And
14 also move to introduce Exhibit 74, which is the photograph
15 taken of the search warrant of the piece of paper talking
16 about urinating in the parking lot.

17 THE COURT: They will be admitted.

18 MR. RAMSEYER: Thank you, Your Honor.

19 (Government's Exhibit SB-2 received.)

20 (Government's Exhibit JMay-3 received.)

21 (Government's Exhibit DR-1000 received.)

22 (Government's Exhibit 74 received.)

23 MR. RAMSEYER: The Government calls Dr. Bassam.

24 THE COURT: Yes, sir. If you'll come forward and
25 stand before the clerk and be sworn, please.

1 THE CLERK: If you'll raise your right hand.

2 Do you solemnly swear that the testimony you're
3 about to give in this case shall be the truth, the whole
4 truth, and nothing but the truth, so help you God?

5 THE WITNESS: Yes.

6 THE CLERK: You may take the stand.

7 **DEENI BASSAM,**

8 Called as a witness herein by the Government, having been
9 first duly sworn, was examined and testified as follows:

10 **DIRECT EXAMINATION**

11 BY MR. RAMSEYER:

12 Q. And, Dr. Bassam, there's a cup and water there in that
13 picture, if at any time you need to take a drink.

14 A. Thank you.

15 Q. Please introduce yourself to the jury.

16 A. My name is Dr. Deeni Bassam.

17 THE COURT: Doctor, I wonder if you would pull the
18 microphone so you speak directly into it, not on the side of
19 it like you have it.

20 There we go. Thank you.

21 THE WITNESS: Good morning. My name is Dr. Deeni
22 Bassam.

23 BY MR. RAMSEYER:

24 Q. And, Dr. Bassam, where do you live?

25 A. I live in Manassas, Virginia.

1 Q. All right. And are you a medical doctor?

2 A. I am.

3 Q. All right. And to become a medical doctor, what did you
4 have to do?

5 A. Graduate from a four-year college, go to medical school.

6 Q. You, in particular, what did you do?

7 A. I went to Virginia Tech for my undergraduate degree. I
8 went to the University of Virginia for medical school.
9 Graduated in 1997. Completed an internship in general surgery
10 at North Western University in Chicago. Residency in
11 anesthesiology at New York Hospital in New York. And then a
12 fellowship in pain medicine at Texas Tech Medical Center in
13 Lubbock, Texas.

14 Q. Okay. And the pain fellowship you did, pain medicine
15 fellowship, did anything come of that? Was there some special
16 designation you were getting by doing that?

17 A. Yes, sir. By completing the fellowship I was completing
18 the requirements to become board certified in pain management
19 and medicine.

20 Q. And are you, in fact, board certified in pain management
21 and medicine?

22 A. Yes, sir.

23 Q. Not only did you have to do the fellowship, what else did
24 you have to do?

25 A. In order to become board certified in pain medicine, you

1 have to have graduated from an accredited fellowship which is
2 at least a year long. You have to have a study for and sat
3 and passed written examination boards in pain medicine. Then
4 you have to maintain those credentials with ongoing continuing
5 education and recertification.

6 Q. Have you done all those things?

7 A. Yes, sir.

8 Q. So are you at this time board certified in pain medicine
9 and pain management?

10 A. I am.

11 Q. And how long have you been certified?

12 A. Since 2002.

13 Q. All right.

14 THE COURT: Doctor, I'm not sure that I got your
15 first name.

16 THE WITNESS: Yes, sir, it's Deeni. D-e-e-n-i.

17 THE COURT: Thank you.

18 BY MR. RAMSEYER:

19 Q. And, Dr. Bassam, have you been practicing in the pain
20 management field?

21 A. Yes, I am.

22 Q. Approximately how long have you done that?

23 A. I've been practicing since I graduated.

24 Q. Okay. Now, at some point did you become involved with
25 the Virginia Board of Medicine?

1 A. I did.

2 Q. Okay. When was that?

3 A. Approximately 2008.

4 Q. Okay. How long is a term on the Board of Medicine?

5 A. Four years.

6 Q. And did you serve a full term?

7 A. I did.

8 Q. All right. And what were your duties on the Virginia
9 Board of Medicine?

10 A. So my duties were mainly around reviewing cases that come
11 before the Board of Medicine typically involving improper
12 prescribing habits of healthcare providers in the state when
13 those cases were referred to the Virginia Board. The board
14 has a responsibility to review them and adjudicate them and
15 decide if there's any action that needs to be taken against
16 the license of the individual, such as restricting it or
17 revoking it. And so I was involved in that process as a board
18 member for four years, which means I was reviewing cases, as
19 well as sitting on panels of physicians in administrative
20 hearings.

21 Q. And approximately how many of those different kinds of
22 hearings did you participate in over four years? Or if you
23 know, like, per month, if that's an easier way to describe it.

24 A. I would take generally somewhere between two to four work
25 days per month and travel to Richmond and dedicate the day to

1 the work of the board.

2 Q. Okay. And when you did that, were you reviewing
3 basically professional practice of physicians and proper
4 prescribing?

5 A. Correct. Most of my cases involved improper prescribing
6 cases and allegations.

7 Q. Okay. And were those just for Manassas or where did
8 those people that came before you come from?

9 A. No, sir. These cases come from all over the
10 commonwealth.

11 Q. So for approximately four years you were reviewing what
12 doctors were doing all over the state of Virginia?

13 A. Correct.

14 MR. RAMSEYER: All right. Your Honor, at this time
15 I'd ask that Dr. Bassam be recognized as an expert in the
16 field of pain medicine and prescribing of controlled
17 substances.

18 THE COURT: Any objection?

19 MR. WILLIAMS: No, Your Honor.

20 THE COURT: Very well. You may proceed.

21 BY MR. RAMSEYER:

22 Q. Now, Dr. Bassam, in the field of pain management is the
23 only tool available to you controlled substance prescriptions?

24 A. No, sir.

25 Q. What tools do you have? What's -- what's proper practice

1 when a patient comes in?

2 A. Well, generally, to answer your question, proper practice
3 is -- starts with a thorough in-depth assessment of the
4 patient's condition. I think there is a responsibility to
5 know what you're treating and what the diagnosis is. And
6 then -- as a beginning. And then based on that to be able to
7 formulate a plan to help the person.

8 So in answer to your question about the types of
9 tools, medications are one tool among many. But in my field
10 there is a broad spectrum of options to help patients from
11 medications, to therapy, to family and psychological support,
12 to counseling, to injections, to surgery. The answers often
13 depend mainly on the underlying condition and the degree of
14 severity of that condition, which is why it's so important to
15 know what you're treating.

16 Q. All right. And, Dr. Bassam, have you been consulted
17 before by the Government to review files?

18 A. I have.

19 Q. And in relation to this case, were you provided certain
20 patient files of Dr. Smithers and asked to review them to give
21 your opinion as to whether the prescriptions issued were
22 within the scope of professional practice for legitimate
23 medical purpose?

24 A. Yes, I was.

25 Q. All right. And can you -- after reviewing those files,

1 can you tell the jury kind of your general impression of what
2 was going on based on your review of the patient files?

3 A. After review of the files initially, I became very
4 concerned because of the, really, lack of any depth to these
5 medical files. And they were files that I was not used to
6 seeing. In fact, so much so that I communicated with the U.S.
7 Attorney to make sure I got all the files. There was really a
8 significant -- a lack of information that I would normally see
9 in medical files that would help capture the thought processes
10 of a physician as they go through the process of working up a
11 problem, coming to a diagnosis, and a treatment plan. These
12 files really lacked any of the elements that I would normally
13 see in a physician file capturing patient encounters.

14 Q. And is one of the things that a doctor does keep good
15 files, keep a good record of what happened?

16 A. The medical record is of extreme importance. It's the
17 only way to memorialize the encounter and to capture the
18 thought processes and decision-making processes of the
19 physician based on the patient's presentation and information
20 that's collected. So if -- it's important also for the
21 physician themselves. If you're in a busy practice, you're
22 treating in some cases thousands of patients a year. You have
23 no possible way of remembering what you did for whom and what
24 the details were surrounding that decision if you didn't
25 capture it in the medical file. And then further, those

1 medical files don't exist in a vacuum. We live in a society
2 where those files end up often in other people's hands for
3 review. Patients move and transfer doctors. Other physicians
4 need to be able to read your files and understand what you did
5 and why you did it. Those files end up in insurance offices,
6 in courtrooms, and so it's important so that the files be
7 maintained in a way that somebody can come after you who is
8 qualified and understands what you do about medicine and is
9 able to review those files and make sense of your decision
10 making.

11 Q. And what about the Schedule II controlled substances, is
12 it important to keep track of those and the reasons why you're
13 prescribing those?

14 A. Yes, it's especially important. I tell my patients,
15 these are not vitamins. These are strong narcotic
16 medications. In many cases, controlled substances. And
17 there's even a heightened importance of keeping accurate
18 records and files when you're prescribing controlled
19 substances to be able to document the decision making, the
20 medical necessity, why you arrived at that decision, what
21 other options did you consider? and, ultimately, how you
22 monitored and followed the progress of the patient when you're
23 prescribing these strong medications.

24 Q. So, again, if a doctor practicing in this area -- if a
25 patient comes in and says they're in pain, does that mean they

1 get Schedule II narcotics?

2 A. I would say that it depends on a lot more than just
3 simply the patient saying that they're in pain.

4 Q. All right. Now, was there anything about -- did you
5 notice that the patient files you were reviewing, the patients
6 were all getting Schedule II controlled substances?

7 A. Yes.

8 Q. And did that strike you in any way given the files?

9 A. Well, it implies that this is the nature of the practice.
10 I ultimately reviewed almost 50 files and every one of them
11 was prescribing narcotic medications. So I assumed that this
12 is a representative sample of the entire practice and
13 reflective of the whole practice.

14 MR. WILLIAMS: Your Honor, I would object as to
15 speculation where he's assuming.

16 THE COURT: I'll overrule the objection.

17 BY MR. RAMSEYER:

18 Q. All right. So what we're going to do at this point is go
19 through these files individually so you can explain to the
20 jury some of the bases for your opinion.

21 Let me ask you first, you reviewed all the
22 prescriptions that are charged in the indictment. And what
23 was your opinion as to all of those, being as to whether --
24 were they within the scope of professional practice?

25 A. After reviewing all the files in totality and the

1 prescriptions, I -- it was -- I came to the conclusion, it was
2 my opinion that the -- what was happening here was not
3 resembling what I recognize as the practice of medicine. This
4 primarily leads to the logical conclusion that the
5 prescriptions were not written for a legitimate medical
6 purpose.

7 Q. Was it your opinion they were outside the scope of
8 professional practice?

9 A. Yes.

10 Q. So let's start with Robert Battaglia. I'm going to show
11 you, I'm going to start with RB-1. So this is a Priority
12 Urgent Care Patient Intake Form. Do you see that?

13 A. Yes.

14 MR. RAMSEYER: All right. Then we go to page 2.

15 A consent to -- for treatment.

16 Go to page 3. It's dated July 24, 2015.

17 If you could go to page 4.

18 This is page 3.

19 Page 4.

20 Go to page 5.

21 BY MR. RAMSEYER:

22 Q. This is called a Review of Systems. And correct me if
23 I'm getting any of this wrong. I'm just trying to move it
24 along quickly.

25 A. That's correct.

1 MR. RAMSEYER: Page 6. Physician Assessment. Dated
2 July 24, 2015.

3 If we go to page 7.

4 That's all for that one.

5 If you could go to RB-2.

6 BY MR. RAMSEYER:

7 Q. So in RB-2, page 1, Client Audit REMS Screening, Inc. Do
8 you see that?

9 A. Yes.

10 Q. Is that something you're familiar with?

11 A. No, it's not. It's not something I've ever seen.

12 MR. RAMSEYER: All right. If we can go to page 2.

13 More of the Pre-screening Audit, REMS Screening.

14 Go to page 3.

15 Page 4, please.

16 BY MR. RAMSEYER:

17 Q. So on page 4, appears to be a criminal records check; is
18 that correct? Page 4 and 5?

19 A. Yes, sir.

20 Q. All right. And, again, is that something -- page 5 is
21 criminal records. Is that something you're familiar with
22 seeing in files?

23 A. Actually, it's not. It's not something I'm used to
24 seeing in medical files.

25 MR. RAMSEYER: Okay. And we go to page 6. And go

1 to -- which is blank. Page 7, more criminal record.

2 We can go back to page 5, if you don't mind.

3 Okay. You can scroll through. So it's various
4 pages of criminal records for Mr. Battaglia.

5 BY MR. RAMSEYER:

6 Q. And then on page 12, it's PC, Patient Contact, Form. Can
7 you see that?

8 A. Yes, sir.

9 MR. RAMSEYER: And go to the next page.

10 BY MR. RAMSEYER:

11 Q. So this is a New Patient Intake Form for pain management
12 for Smithers Community Healthcare Clinic PC. And it says on
13 here, "Approximately when did this begin?"

14 "Ten years ago." Do you see that?

15 A. Yes, sir.

16 Q. And it says, "What caused your current pain episode?"

17 "Driving every day. Car accidents."

18 Do you see that?

19 A. Yes, I do.

20 MR. RAMSEYER: All right. We can go to the next
21 page.

22 BY MR. RAMSEYER:

23 Q. And this is what we call a PMP; is that right?

24 A. Yes, it is.

25 Q. That's to show prescriptions; if the patient's getting

1 them from other doctors or filling the prescriptions you're
2 prescribing.

3 A. That's correct.

4 MR. RAMSEYER: Go to the next page. Page 15 is more
5 PMP.

6 Page 16, more compliance audits REMS screening page.

7 Then we go to page 17. So this is a Brief Pain
8 Inventory (Short Form).

9 BY MR. RAMSEYER:

10 Q. And just ask about, any of these things we've seen so
11 far, do those help you as a doctor to see what to do with the
12 patient? Are they conclusive? What are those things, in your
13 opinion?

14 A. The short answer to your question is no. This, so far,
15 and most of the records that I reviewed, is a collection of
16 papers that captures self-reported symptoms by patients,
17 whether the patient themselves is filling out the form
18 describing their own situation or the physician is filling out
19 the form based on what the patient is telling them
20 subjectively about their situation. So, no, it's very much
21 insufficient to be able to come to a diagnosis and assessment
22 and accurately come up with an appropriate treatment plan.

23 MR. RAMSEYER: All right. So we'll go to page 18.

24 Go to page 19.

25 If at any point there's something here that you want

1 to point out, feel free, but I'm trying to move through it.

2 So page 20.

3 If we can go back to page 20 for a minute.

4 BY MR. RAMSEYER:

5 Q. Down here at the bottom, it says, "reviewer." And I'll
6 represent to you the evidence has been that that "JDO" is from
7 Joel Smithers, the doctor, showing he reviewed it on
8 November 30th, 2015. Do you see that?

9 A. Yes, sir, I do.

10 MR. RAMSEYER: If we can go back to the first page
11 of that. I'm sorry -- go back to 19.

12 18.

13 17.

14 BY MR. RAMSEYER:

15 Q. All right. So this indicates the patient came in on
16 November 30th, at 8:48; correct? Is that what it says up
17 there at the top?

18 A. November 30th, 8:48, that's correct. Yes, sir.

19 MR. RAMSEYER: Then we can go to page 21 now.

20 BY MR. RAMSEYER:

21 Q. So do you recognize this? Is this part of that SOAPP-R?

22 A. Yes. It looks like the second page of a patient filled
23 out questionnaire called a SOAPP-R.

24 MR. RAMSEYER: Okay. Go to page 22. This is a
25 consent for treatment.

1 Page 23. More of a questionnaire.

2 Page 24. Another questionnaire.

3 Go to page 25. More of a questionnaire.

4 26. More of a questionnaire.

5 Page 27, more of a questionnaire.

6 28, more of a questionnaire.

7 29, more of a questionnaire.

8 BY MR. RAMSEYER:

9 Q. 30 is the first page of that SOAPP-R.

10 A. Yes, sir.

11 MR. RAMSEYER: 31. Copy of driver's license.

12 BY MR. RAMSEYER:

13 Q. Page 32 is a letter discharging Mr. Battaglia dated
14 June 1st of 2016. Do you see that?

15 A. Yes, I do.

16 MR. RAMSEYER: All right. And if we move on to
17 page 33. Substance abuse treatment facility locator.

18 Go to page 34.

19 Keep going. Page 35.

20 Page 36.

21 A brief pain inventory.

22 Go back one page. Sorry. So locate -- go back one
23 more.

24 So this indicates that there's a substance abuse
25 facility at Cumberland Road, Cedar Bluff, Virginia, Community

1 Substances Abuse Program.

2 Can we go to 36, please.

3 Another brief pain inventory. This one is October,
4 looks to be maybe 29 of 2015.

5 BY MR. RAMSEYER:

6 Q. And, again, what does this do for you as a doctor? When
7 you see this, does this mean a person should be on controlled
8 substances?

9 A. No. Again, this is just simply one small element of
10 what's needed to make a complete encounter for the patient.
11 This is simply the patient telling you what their symptoms
12 are. That's a start, but that's not a complete medical
13 encounter.

14 MR. RAMSEYER: All right. Go to the next page.

15 37 is more of a questionnaire.

16 38.

17 BY MR. RAMSEYER:

18 Q. It says, "Tolerates prescription well." Do you know what
19 this is? I don't know if that's medical speak or what that
20 is.

21 A. Without. "S" with a line over it is without.

22 "Tolerating prescription well without side effects -- I'm
23 going to assume, I'm not familiar with this, but I think it
24 means side effects. "OxyContin 60 milligrams, 10 per tab.
25 Patient is currently working but without insurance."

1 Q. So is it saying the pills are \$10 a tablet? Is that a
2 dollar sign? Can you tell?

3 A. I -- it could be.

4 Yep. That looks like it now that you zoom in on it.

5 Q. Then "S" is without insurance?

6 A. Yes. "S" with a line over it means without.

7 MR. RAMSEYER: All right. Next page, 39. More of a
8 questionnaire.

9 Page 40 a prescription for Zanaflex.

10 THE WITNESS: Yes, sir.

11 MR. RAMSEYER: Page 41. Prescription for OxyContin.
12 60 milligrams, 60 tablets.

13 And 42. Oxycodone 20 milligrams, 90 tablets.

14 Now, those both indicate --

15 Go back.

16 BY MR. RAMSEYER:

17 Q. Those are October 29th, and we'll go back later to that.
18 But from the evidence that's already been submitted there were
19 prescriptions written on September 3rd of 2015 for MS Contin
20 15 milligrams, and oxycodone 30 milligrams.

21 But let me just ask you in general, these quantities
22 of narcotics, are these -- what can you say about them?

23 MR. RAMSEYER: Go back to the previous page please,
24 page 41.

25 ///

1 BY MR. RAMSEYER:

2 Q. 60 milligram tablet of OxyContin. Is that for, like, a
3 headache? Is that a small pain dose?

4 A. These would be considered high doses of opiate
5 medications, narcotic medications. They add up to quite a few
6 milligrams, well over 100 morphine milligram equivalents per
7 day. And that's considered high doses of narcotics.

8 Q. So you say "morphine milligram equivalents," is that a
9 way to equate different drugs and their strength?

10 A. It is. Different drugs have different strengths and we
11 can compare them to morphine and it gives us a way to follow
12 the total amount of narcotic medication the patients are being
13 prescribed or taking. So adding that up for these
14 medications, you're well over 100 milli-equivalents of
15 morphine per day that the patient is being prescribed.

16 Q. For instance, for this Robert Battaglia on October 29th,
17 it's a 60-milligram tablet, and there's 60 tablets for
18 30 days. So that would be two tablets a day; correct?

19 A. Yes, sir.

20 Q. 120 milligrams a day; correct?

21 A. Of OxyContin, yes.

22 Q. Kind of a pill that's been around a long time, like a
23 Percocet. The standard Percocet was a Percocet 5. That's
24 five milligrams of oxycodone; right?

25 A. That's correct. The active ingredient is five milligrams

1 versus, in this case, 120 milligrams.

2 Q. So this guy is taking -- or what's being prescribed,
3 doing the math, 24 -- equivalent of 24 Percocets a day of
4 oxycodone amounts?

5 A. Yes, that's correct. That's the equivalent.

6 MR. RAMSEYER: All right. Can we go to page 42.

7 BY MR. RAMSEYER:

8 Q. And on top of that, he's getting an additional 90
9 oxycodone 20 pills; is that correct?

10 A. That's correct.

11 Q. And that would be three times a day for --

12 A. Yes, taken regularly that would be three times a day.

13 Q. So that would be 60 milligrams of that; is that correct?

14 A. Correct. 60 additional milligrams.

15 Q. So he's prescribed this guy 180 milligrams of oxycodone
16 per day; is that correct?

17 A. Per day, that's correct.

18 Q. So that would be 30 Percocet 5s; correct?

19 A. Yes, sir.

20 Q. Is that correct?

21 A. Mm-hmm.

22 MR. RAMSEYER: Page 43. More of this compliance
23 audit.

24 Page 44. Another part of PMP.

25 Page 45, Brief Pain Inventory.

1 Page 46, more of that.

2 Page 47. So here, this is October 1 of '15, the
3 date the doctor is initialling it. If we can go back to the
4 first page of the pain inventory. Shows that the patient
5 filled this out October 1, the same day.

6 And go to that last page again, please. 47.

7 BY MR. RAMSEYER:

8 Q. If you could read what this is, please. We can zoom that
9 in.

10 A. Sure. "Patient reports taking and tolerating
11 prescription well. He does not feel the current dose of MS
12 Contin is treating his pain. Denies any nausea, vomiting.
13 D -- I'm not sure what that means, diarrhea or diaphoresis,
14 and C, I'm not 100% sure what the doctor means by that initial
15 either. But he's essentially describing that the patient
16 denies any side effects of the current dose.

17 Q. Okay. So the records show -- maybe this might help.

18 MR. RAMSEYER: Your Honor, if I might approach the
19 witness.

20 THE COURT: Yes, sir.

21 BY MR. RAMSEYER:

22 Q. Dr. Bassam, you previously had gone through this exhibit,
23 actually went through it again. Went through it last night
24 and made check marks on it and signed it; is that correct?

25 A. That's correct.

1 Q. So does that indicate that for all of those prescriptions
2 you've indicated they're not for legitimate medical purpose
3 and they're outside the scope of professional practice?

4 A. That's correct.

5 Q. All right.

6 MR. RAMSEYER: Your Honor, I'd move for admission
7 into evidence of Government's Exhibit -- I believe it's 107.
8 Yes, Your Honor, 107.

9 THE COURT: It will be admitted.

10 (Government's Exhibit 107 received.)

11 MR. RAMSEYER: I'm going to let you keep that
12 because that shows the date of the prescriptions we've been
13 talking about.

14 BY MR. RAMSEYER:

15 Q. So if you can see on that, if you look on Exhibit 107, it
16 shows that on September 3rd of 2015, a prescription was
17 written for MS Contin 15 milligrams, 60 pills. And oxycodone
18 30 milligrams, 120 pills; is that correct?

19 A. Yes, that's correct.

20 Q. All right. And so that's happened before this visit.
21 Then when he comes back on the next visit, he's basically
22 saying the MS Contin is not working. The morphine is not
23 working; is that right?

24 A. Yes, that's what you've highlighted in the follow-up
25 visit.

1 Q. So, as you can see in the chart, then on October 1st the
2 doctor changes him from MS Contin 15 to OxyContin
3 60 milligrams, 60 pills, which is the prescription we just
4 looked at previously.

5 A. Yes. And oxycodone.

6 Q. I'm sorry, it's not the one we looked at previously.
7 That will be the next one. But he did, in fact, take him off
8 the MS Contin and put him on the OxyContin.

9 A. That's correct.

10 Q. And that's when the patient asked to; is that right?

11 A. Yes, at a substantially higher dose.

12 Q. All right.

13 MR. RAMSEYER: Next page please.

14 48. Nothing on it.

15 49. More of the questionnaires.

16 50. Doctor's instructions about nortriptyline,
17 Zanaflex, and GABA. I believe that would be Gabapentin.

18 THE WITNESS: Yes, I'm assuming so.

19 MR. RAMSEYER: Also known as Neurontin. That's
20 page 50.

21 BY MR. RAMSEYER:

22 Q. Then page 51 is Form 1.1, Initial Pain Assessment Tool,
23 dated September 5 of '15. Do you see that?

24 A. Yes, I do.

25 Q. And it indicates that the nurse is Angel Smithers. Do

1 you see that? Right here?

2 A. Yes, I see that. Thank you.

3 Q. And then it appears that whoever wrote Angel Smithers,
4 that handwriting seems to match most of the other handwriting;
5 is that correct?

6 A. Yes, I agree.

7 Q. And, again, does that justify controlled substances that
8 Dr. Smithers was writing?

9 A. No. This, again, assessment is simply a collection of
10 the patient's symptoms and a description of their condition.
11 It's insufficient to justify prescribing high doses of
12 narcotics to an individual.

13 Q. Okay. But it shows here somebody, in different
14 handwriting than the nurse and same ink as Dr. Smithers it
15 looks like, has marked something on the person. Would that
16 justify controlled substances if a doctor says they say
17 they're in pain in their neck and their back?

18 A. No.

19 Q. Okay. Why not?

20 A. Because that's, again, just simply capturing the
21 patient's subjective complaints. It's a fraction of what's
22 necessary in a complete medical encounter to be able to arrive
23 at an accurate and complete diagnosis and appropriate
24 treatment plan.

25 MR. RAMSEYER: All right. If we can go to page 52,

1 please.

2 This is a discharge summary. If we could pull this
3 up, please.

4 This is a discharge summary, September 3 of 2015,
5 for Robert Battaglia.

6 If we can zoom back out now, please.

7 BY MR. RAMSEYER:

8 Q. And this is for some non-controlled; is that correct?

9 A. Zanaflex, diclofenac, yes.

10 Q. At least they're not Schedule II.

11 A. Correct. They're not Schedule IIs.

12 MR. RAMSEYER: If we can go to 53. Appears to be
13 the same thing.

14 Go to page 54.

15 Okay. So this one is narcotic medication. If we
16 zoom that up, same date.

17 THE WITNESS: Yes. MS Contin, oxycodone, both are
18 narcotics.

19 MR. RAMSEYER: All right. And it says down at the
20 bottom here, if we could blow that up. I'm just going to read
21 this, you tell me if I'm getting it wrong.

22 "I understand the emergency care I received is not
23 intended to be complete and definitive medical care and
24 treatment. I acknowledge that I've been instructed to contact
25 the above physician as indicated for continued and complete

1 medical diagnosis, care, and treatment. EKGs and X-rays and
2 lab studies will be reviewed by appropriate specialist and I
3 will be notified of significant discrepancies. I also
4 understand that my signature authorizes this medical center to
5 release all or any part of my medical record, including, if
6 applicable, information pertaining to AIDS and/or HIV testing,
7 mental health records, and drug and/or alcohol treatment for
8 the follow-up physicians listed above."

9 BY MR. RAMSEYER:

10 Q. Did I get that right?

11 A. Yes, sir.

12 Q. So if you look at your chart, Exhibit 107, you can see
13 that that date, that discharge summary, is the first date that
14 we've charged illegal distributions; correct?

15 A. September 3rd, 2015.

16 Q. Yes.

17 And so it says "discharge summary," but that's not
18 the last time Dr. Smithers sees -- or writes prescriptions for
19 Robert Battaglia; correct?

20 A. No. In fact, that's the first time. Certainly not the
21 last time.

22 MR. RAMSEYER: So we'll go to the next page.

23 BY MR. RAMSEYER:

24 Q. In fact, it goes all the way to May of 2016; is that
25 correct?

1 A. That's correct.

2 MR. RAMSEYER: Next page.

3 BY MR. RAMSEYER:

4 Q. Now here's a checklist for long-term opioid therapy.
5 It's got some rubber stamps on it for September 5th of 2015,
6 and October 1st of 2015 for certain things. Is anything
7 written in the outcome?

8 A. Nothing is written in the outcome.

9 MR. RAMSEYER: Okay. Next page, 57, is blank.

10 58. Another Brief Pain Inventory. This one appears
11 to be blank.

12 THE WITNESS: Yes.

13 MR. RAMSEYER: Okay. Keep moving through that. 59
14 is blank.

15 60, brief pain inventory, blank.

16 61, more of the same.

17 62 is a transmission verification report.

18 63 is a fax. On this fax it says, "Dr. Smithers is
19 requesting enclosed patient's full treatment record and
20 specifically needs the patient's --

21 Let's move out.

22 -- dated medication delivery or records showing
23 dates patient received methadone. Thanks much?"

24 BY MR. RAMSEYER:

25 Q. That's dated May 24th, 2016; is that right?

1 A. Yes, it is.

2 Q. So that's about eight months after he's started writing
3 controlled substances to him.

4 A. Yes, it is.

5 MR. RAMSEYER: All right. Go to the next.

6 Another Brief Pain Inventory. This one is dated --
7 Can you blow that up?

8 I believe that's 4-11.

9 THE WITNESS: April 11, uh-huh.

10 MR. RAMSEYER: 2016. There's a sticky on it,
11 "Patient reminded to bring bottles."

12 Next page.

13 Okay. Next page, 66.

14 BY MR. RAMSEYER:

15 Q. All right. On here, again, looks like the doctor is
16 writing some things down.

17 A. Yes, sir.

18 Q. Isn't that what a doctor is supposed to do? Isn't he
19 doing everything right there?

20 A. No, sir. This is -- this is far from everything a doctor
21 needs to do in this type of a clinical encounter.

22 Q. Okay. But the patient says he's got increased leg pain.
23 Doesn't that mean he should get controlled substances?

24 A. No, not automatically.

25 MR. RAMSEYER: All right. So let's go to the next

1 page. More notes.

2 Next page. More of a survey.

3 Page 69 is another copy of that June 1st letter
4 discharging him.

5 Page 70 is another copy of the same Cumberland
6 Mountain Community Services Board Substances Abuse Program
7 address.

8 71 and 72, part of that.

9 73 is that fax again.

10 74 is patient contact form.

11 Consent for treatment is 75.

12 New River Treatment. This is May 25th of '16. It's
13 a fax cover sheet.

14 THE WITNESS: Yes.

15 MR. RAMSEYER: 77.

16 It's an authorization to exchange information.

17 Unsigned.

18 78. Checklist for disclosure, Battaglia.

19 Keep going.

20 BY MR. RAMSEYER:

21 Q. Page 79, this is a receipt, which appears to be for the
22 mailing of something. Do you see that? Dated June 2nd, 2016?

23 A. Yes.

24 MR. RAMSEYER: Okay. And then page 80 are copies of
25 prescriptions. So Opana ER and oxycodone dated March 9 of

1 2016.

2 Next page. More prescriptions.

3 Next page. More prescriptions.

4 Next page. More prescription.

5 Next page. More prescriptions.

6 87 is more prescriptions.

7 88 is more prescriptions.

8 89 is more prescriptions.

9 90 is more prescriptions.

10 91 is more prescriptions --

11 Go back to that one, please. 91. That one is

12 October 29. So go to the next one.

13 BY MR. RAMSEYER:

14 Q. It's another receipt for a credit card for \$30.65 dated
15 May 12 of 2016 from Priority Urgent Care.

16 A. Yes.

17 MR. RAMSEYER: Next. Same thing. Another receipt
18 in the amount of \$300.

19 Certified mail receipt dated June 2nd, 2016.

20 Page 96 is a sticky note. Mr. Battaglia's address
21 and phone number, presumably.

22 Page 90- -- is that all?

23 Is there an RB-3? There's not.

24 BY MR. RAMSEYER:

25 Q. So that's the patient's file of Robert Battaglia who

1 received prescriptions for MS Contin, oxycodone, OxyContin,
2 fentanyl, oxymorphone from September of 2015 to May of 2016.

3 Those prescriptions were issued to Mr. Battaglia by
4 Dr. Smithers. In your opinion were those within the scope of
5 professional practice and were they for legitimate medical
6 purpose?

7 A. No.

8 MR. RAMSEYER: All right. Next we'll go to Frank
9 Blair.

10 We'll start off with FB-1, page 1.

11 And this -- we can go up here, see what this is.
12 (Indicating).

13 So it says Frank Blair, date of birth, got a date of
14 March 2, 2017.

15 Scroll up. Go back up, please.

16 BY MR. RAMSEYER:

17 Q. Some sort of thing indicating a billing chart or
18 something; is that right?

19 A. Yes, sir. These are a list of diagnoses and what are
20 called ICD codes that's often used for billing purposes,
21 preauthorization purposes.

22 Q. Okay. And this one, it's been circled as headache and
23 osteoarthritis, unspecified site; is that right?

24 A. Yes, sir.

25 MR. RAMSEYER: Go to page 2.

1 Another Brief Pain Inventory.

2 Go more.

3 Keep going.

4 Page 4.

5 Page 5.

6 Page 6.

7 What I'm going to do, again, to try to move this
8 along because we have 50 of these. Just going to scroll
9 through the pages. If there's something there you want to
10 point out, we'll stop. But, otherwise, we'll go through.

11 THE WITNESS: Thank you.

12 MR. RAMSEYER: Hold it right there on 53.

13 Let's blow this up.

14 BY MR. RAMSEYER:

15 Q. This is April 27 of 2016. Can you read that, please.

16 A. Yes, sir. "Patient takes and tolerates prescription well
17 without issue. Patient reports moderate control of pain this
18 month. He believes four OP-ER -- I guess that means Opana ER,
19 "40 milligrams would better control his pain since he reports
20 his tolerance is 'very high'."

21 Q. What does that tell you as a doctor?

22 A. This tells me that the physician is just simply capturing
23 what the patient is telling him. The patient is telling him
24 that, for reasons that are not clearly documented, his
25 self-reported pain was worse this month, and the patient

1 believes that he needs more narcotic medication and that he
2 has -- and this is because he has a high tolerance.

3 This is, in my opinion, inconsistent with a patient
4 who is struggling from a severe pain problem. And to this
5 date, looking at this record, I still don't even understand
6 what the patient's diagnosis is that would justify anything
7 close to this level of medication. So it concerns me a great
8 deal that this is used as justification to increase what's
9 already high doses of opiates.

10 Q. And the doctor may or may not increase it. But what does
11 it tell you about the patient?

12 A. I'm not sure what it says about the patient. It concerns
13 me because, in general, this kind of behavior on behalf of a
14 patient is consistent with a patient who is struggling with
15 some type of opiate use disorder or addiction to their
16 medications that's perhaps using it for non-medical purposes.

17 Q. Okay. And can you explain to the jury the difference
18 between a pain patient and a pain medicine patient, as you see
19 it?

20 A. The way I would describe it is this. When you're working
21 in this space as a physician, it's very, very important for
22 you to be able to differentiate between a person that has a
23 pain problem versus a person that has a pain medicine problem.
24 These are different people with very different problems. And,
25 frankly, they behave and act in very different ways. To put

1 it simply, a person who has a pain medicine problem, who is
2 struggling with addiction, who is perhaps diverting their
3 medications to others, will, frankly, behave over time like a
4 person who is doing exactly that.

5 A person who is struggling with a legitimate and
6 severe pain problem will act in a very different way and it
7 will be consistent with a person who is struggling with a pain
8 problem. So I think it's very important for a doctor to be
9 able to very quickly and early in this type of relationship
10 differentiate between a person who has a pain problem and a
11 pain medicine problem. They act different. They need
12 different treatment plans. They need different direction and
13 it's critical to be able to make that difference.

14 What I'm looking at on this paper, on this page, and
15 really throughout this record, are people that are struggling
16 with pain medicine problems. There's very little in any of
17 the documentation of significant pain problems.

18 Q. All right. So if it's a pain patient, they're going to a
19 doctor to have their pain treated or to have their problem
20 treated, how would they act that would be different?

21 A. Well, they would want to know what's wrong. They'd want
22 to know, first of all, what's wrong? Why does it hurt so bad
23 that I have to take hundreds of milligrams of morphine per
24 day? They would want to know what's wrong. They'd want to
25 know what can be done about the problem so that they don't

1 have to rely on huge doses of opiates and narcotics on a daily
2 basis.

3 That fundamental wish would drive their behavior and
4 they would be seeking not just ways to mask the pain with
5 narcotics, but to treat the underlying condition and improve
6 that and their overall health in the process.

7 Q. All right.

8 MR. RAMSEYER: All right. If we can go to page 154.
9 When we get to 154, I'd ask you to stop.

10 Stop there. Let's talk about that real quick. This
11 is 93.

12 Again, this is -- highlight that. Discharge summary
13 dated September 10, 2015.

14 BY MR. RAMSEYER:

15 Q. And again, these are not Schedule III narcotics; correct?

16 A. That's right.

17 MR. RAMSEYER: Okay. If we can go to the next page.
18 Page 94.

19 Okay. Let's stop there. 96.

20 BY MR. RAMSEYER:

21 Q. This is that same date. Those are Schedule II narcotics;
22 correct?

23 A. Yes, they are.

24 MR. RAMSEYER: All right. Go ahead.

25 ///

1 BY MR. RAMSEYER:

2 Q. Now, again, here's the Initial Pain Assessment Tool.

3 Again, it's Angel Smithers. And then there appears to be
4 handwriting by somebody else, maybe Dr. Smithers.

5 Again, does -- it says down here that, "Patient
6 reports poor pain control." Doesn't that mean he should just
7 get controlled substances?

8 A. No. What are we prescribing controlled substances for in
9 the first place to this person? What's wrong? What's the
10 problem? What's the diagnosis? The patient is simply
11 reporting it to the doctor and the doctor is just copying on
12 to the chart where the patient says it hurts. That's far from
13 a diagnosis of what's wrong. Pain is a symptom. It's not a
14 diagnosis in and of itself.

15 MR. RAMSEYER: All right. Go to the next page.

16 And page 114 is a checklist for long-term opioid
17 therapy. Stamp marks for September 10th. Handwritten
18 October 8.

19 BY MR. RAMSEYER:

20 Q. Any outcomes on those?

21 A. Nothing in the outcomes.

22 MR. RAMSEYER: All right. Okay. As we come to 154.

23 Could we go back one more please. 153.

24 BY MR. RAMSEYER:

25 Q. This patient did not bring bottles or meds again. Dated

1 November 10, '16. Do you see that?

2 A. Yes, sir.

3 MR. RAMSEYER: Then we go to 154.

4 BY MR. RAMSEYER:

5 Q. So this is second non-RXD. The drug testing
6 consistencies authorizing illicit substance. Do you see that?

7 A. Yes, sir.

8 Q. So does this indicate knowledge that he tested positive
9 for Buprenorphine at some point; is that correct?

10 A. That's correct.

11 Q. And Buprenorphine, that's a Schedule II controlled
12 substance that's used to treat people with drug addiction; is
13 that right?

14 A. It's one of its main uses is exactly that.

15 Q. And Dr. Smithers was not prescribing Buprenorphine for
16 him, was he, according to the records?

17 A. No, according to the records, he was not.

18 MR. RAMSEYER: So here, if you go down here to 155.

19 Zoom that in.

20 BY MR. RAMSEYER:

21 Q. This is one of these compliance reports. It indicates
22 UDT failure for oxazepam. Is that A. Benitez?

23 A. Yes, it's Benitez.

24 Q. This first failure, that's actually before he was even a
25 patient to Dr. Smithers, according to the records; correct?

1 A. Yes, sir.

2 MR. RAMSEYER: Okay. Next page.

3 BY MR. RAMSEYER:

4 Q. So there's a sticky note here. "Going to decrease the
5 OC-IR," OxyContin IR, "to 30 if bottles not brought."

6 Doesn't that show the doctor is trying to do the
7 right thing? Everything is legitimate. He's going to
8 decrease the dose if he doesn't bring the bottles in.

9 A. No. It sounds punitive. But the entire thing is
10 predicated on no sound understanding or assessment of the
11 patient's underlying condition. So I think it tells me very
12 little about what the doctor's intentions are.

13 MR. RAMSEYER: All right. Go through.

14 Next page.

15 Let's stop at page 172.

16 BY MR. RAMSEYER:

17 Q. So if you look at your chart, 107, for Frank Blair, if
18 you look at Counts 41, 42.

19 A. Yes, sir.

20 Q. Does that indicate he was prescribed oxycodone and
21 oxymorphone on July 21st of 2016?

22 A. Yes, it does.

23 Q. And if you look down here at -- this is --

24 MR. RAMSEYER: Let me zoom up in here first.

25 ///

1 BY MR. RAMSEYER:

2 Q. Lab report sample for August 18th. Do you see that?

3 A. Yes. August 18th, 2016, urine sample.

4 Q. Okay. And if we go down here, what does it say about the
5 oxycodone that he was prescribed?

6 A. So the urine was analyzed for the presence of oxycodone
7 and noroxycodone. But it was not there.

8 Q. What does that mean?

9 A. This means for three to four days there was no evidence
10 that this person took oxycodone.

11 MR. RAMSEYER: Okay. Go 174.

12 Let me back up.

13 BY MR. RAMSEYER:

14 Q. So according to your chart, 107, when that lab test on
15 August 18th showed negative for oxycodone, does he get a
16 prescription for oxycodone the next month? Well, the next
17 month, meaning the next time we have him, which would be
18 October.

19 A. Yes, that's correct, he does.

20 Q. Okay. It's a smaller dose, but it's still oxycodone; is
21 that correct?

22 A. It's --

23 Q. If you look at the October --

24 A. It's the same dose per pill, it's a smaller quantity.

25 Q. Right. And the oxycodone continues for Frank Blair until

1 March of 2017; is that correct?

2 A. Yes, that's correct. March 2, 2017, is the last
3 prescription you see for Frank Blair.

4 Q. So when your patients are being prescribed heavy duty
5 controlled substances and they're negative for it, what does
6 it tell you is happening? What are the two different options?

7 A. Well, the two options are that -- what it indicates, as I
8 said, is that the patient has not taken the medication at
9 least three to four days. It raises concerns whether indeed
10 the patient is taking it at all. These medications have a
11 high value for people who want to abuse them. It's easily
12 diverted to others. So it raises some serious questions
13 whether the patient has diverted these medications. Or the
14 other scenario is that driven by profound addiction, they
15 consumed all of the medication's month's supply in much
16 shorter time and ran out of the medication.

17 Q. So under either of those circumstances is the right thing
18 to do to keep giving them Schedule II controlled substances?

19 A. Not at all.

20 MR. RAMSEYER: All right. Sorry, back up to
21 page 175, please.

22 BY MR. RAMSEYER:

23 Q. So this is one where we got a positive for Buprenorphine
24 on page 175. Again, not prescribed by Dr. Smithers, according
25 to the records; correct?

1 A. That's correct.

2 Q. Okay. And if we can go to the date. Collected on
3 July 21st, and reported on July 26; correct?

4 A. That's correct.

5 Q. All right. So down here it shows on August 18th,
6 Dr. Smithers's notes indicate -- that second part. Patient
7 reports taking Suboxone from friend while staying --
8 something.

9 A. It's with mom. A "C" with a line over it, it means
10 "with".

11 Q. "With mom and had left his prescription at home."

12 A. Yes. That's how I interpret it.

13 Q. So, again, what does that tell you is going on here?

14 A. So, strictly speaking, it means -- it would appear that
15 this person took some kind of trip to stay with his mom and
16 had left his medications behind. And instead, he had borrowed
17 a friend's similar, not the same medication, Suboxone, and
18 that's why it showed up in his urine drug screen.

19 To me, this is a sort of prime example of the kind
20 of behavior that you would see in a person that has a drug
21 addiction or opioid use disorder and not the kind of behavior,
22 quite the opposite, from someone you would see that struggles
23 with a legitimate and severe pain problem. People with a bad
24 pain problem understand the severity of their condition and
25 the severity of the fact that they have to rely on narcotic

1 medications on a daily basis and manage that condition.
2 They're very careful about those medications. They want to
3 make sure that those medications are kept secure, with them on
4 their person so that they don't run out. And they are very
5 afraid of sharing those medications or taking medications from
6 other people.

7 Meanwhile, people who -- whose underlying problem is
8 an opiate use disorder, an addiction problem, would behave --
9 their behavior is much more consistent with what we're reading
10 here.

11 Q. All right. That's even assuming he's telling the truth;
12 right?

13 A. That's true. If what you're reading here is often true.

14 MR. RAMSEYER: Go to page 169, please.

15 It's earlier on the chart but it's later in time.
16 So we've already talked about the positive Buprenorphine on
17 July 21st. So this is November 10th. If we go up here, it
18 shows November 10th.

19 And if we go to the next page, 70.

20 Next page.

21 I'm sorry, if you can go back one page, please.

22 So here. Pull that up, please.

23 BY MR. RAMSEYER:

24 Q. So back on August 8th, he tested positive for -- excuse
25 me, he tested negative for oxycodone back in August. Kept

1 getting oxycodone. This is a test from November, and, again,
2 he's negative for oxycodone, the drug that's being prescribed
3 to him; is that correct?

4 A. That's correct.

5 MR. RAMSEYER: All right. If we go to page 163.

6 And if we can blow that up please.

7 BY MR. RAMSEYER:

8 Q. We can see it was reported on February 6, 2017. Again,
9 he's negative for oxycodone; correct?

10 A. That's correct.

11 Q. And it's still being prescribed to him; correct?

12 A. That's correct.

13 It appears that the doctor's note next to the
14 negative finding in this case implies a PRN, meaning that the
15 doctor was accepting the negative results and the excuse for
16 the negative result being that the medication is prescribed as
17 needed. And so it would appear that the doctor's documenting
18 the decision-making process as being that he was assuming the
19 patient just simply hadn't taken the medication for a number
20 of days and, therefore, he's not seeing the -- not seeing the
21 importance of this negative finding. Especially repeatedly,
22 if the patient wasn't taking --

23 Q. I was going to show you on your chart, 107.

24 A. Yes, sir.

25 Q. If you go to Count 52, which would be the prescription

1 that was issued prior to this -- or, no, I'm sorry. It would
2 be 50, Count 50.

3 A. Yes, sir.

4 Q. So it shows he was prescribed 20 oxycodone 20-milligram
5 pills the month before; is that correct?

6 A. Yes, that's correct.

7 Q. So that would be -- he wouldn't take one every day;
8 correct? if it was 20 for 30 days?

9 A. If it was 20 for 30 days it wouldn't be every day.

10 Q. Should it be in his system, given the continued
11 prescribing of those?

12 A. Yes, at some point it should. He's taking the medication
13 chronically. If it's not in the system repeatedly, the
14 question is where are the pills? Are they being all used up
15 in the beginning? Are they just sitting and accumulating in
16 bottles not being used? There's no documentation of
17 ultimately where these pills are. It's just a notation by the
18 doctor that since it's prescribed as needed, then he's not
19 anticipating that it needs to be in the urine screen.

20 MR. RAMSEYER: All right. We can go back to 172,
21 which I think is where we were, and finish this chart.

22 173.

23 174.

24 Keep going, please.

25 If I can go back. Go back one slide, I'm sorry.

1 Go back one more page, please.

2 BY MR. RAMSEYER:

3 Q. So up at the top here where it says "medications
4 prescribed".

5 A. Yes.

6 Q. So that would be the prescriptions issued by
7 Dr. Smithers; is that right?

8 A. That's correct.

9 Q. And one of them is Fioricet which is another controlled
10 substance that includes butalbital.

11 A. That's correct.

12 Q. It indicates negative for that.

13 A. That's correct.

14 MR. RAMSEYER: All right. So we go to FB-2.

15 BY MR. RAMSEYER:

16 Q. So it shows the doctor actually at some point discharged
17 Frank Blair; March 29 of 2017?

18 A. Yes, sir.

19 Q. And gave him a titration dose, he says.

20 MR. RAMSEYER: So if we can go to the next page.

21 BY MR. RAMSEYER:

22 Q. So in your opinion does that make all those prescriptions
23 he issued legitimate and within the scope of professional
24 practice because at some point he discharged the patient?

25 A. No.

1 Q. Okay. Why not?

2 A. Because the decision to start or continue these
3 medications was based on a significant insufficient evaluation
4 of the patient's condition. The whole premise of this
5 relationship is based on no foundation.

6 MR. RAMSEYER: Okay. We go on through this file.
7 Just keep going.

8 Wait a minute. Back up on that page. I'm sorry.

9 So one page, page 9.

10 BY MR. RAMSEYER:

11 Q. So this shows this guy is from Lenore, West Virginia.
12 Did you notice that these patients seem to be traveling great
13 distances to see Dr. Smithers?

14 A. Yes, I did.

15 Q. Anything about that seem unusual to you?

16 A. Yes. I mean, the question is why would folks have to
17 travel hours and hours across state lines to see Dr. Smithers?
18 It's hard to imagine a medical reason for that.

19 Q. Okay.

20 MR. RAMSEYER: All right. Is there an FB-3?

21 So that's it for Frank Blair.

22 BY MR. RAMSEYER:

23 Q. Again, based on that chart, your review of it, those
24 prescriptions issued to Frank Blair, were they for a
25 legitimate medical purpose or within the scope of professional

1 practice?

2 A. No, they were not.

3 Q. All right.

4 THE COURT: Mr. Ramseyer, why don't we take a break
5 now.

6 Ladies and gentlemen, if you'll follow the bailiff
7 out, please. We'll take a break.

8 (Proceedings held in the absence of the jury.)

9 THE COURT: Mr. Ramseyer, let me just discuss with
10 you a little bit about how we're going about this. We've got
11 2 of 50.

12 MR. RAMSEYER: Your Honor, I don't intend to go at
13 the same pace with the other ones. I thought it was important
14 to show what's in these files. Then I intended to ask him:
15 During your review of the other files, would you find similar
16 things or those characteristic of that? Then I intended to
17 point out certain things in those other files.

18 THE COURT: All right. Then that will be very good.

19 MR. RAMSEYER: Thank you.

20 THE COURT: All right. If there's nothing further,
21 then we'll be in recess.

22 (Proceedings suspended at 10:23 a.m. and resumed at 10:57
23 a.m.)

24 THE COURT: Are we ready for the jury?

25 MR. RAMSEYER: Yes, Your Honor.

1 THE COURT: All right. We'll have the jury in,
2 please.

3 (Proceedings held in the presence of the jury.)

4 THE COURT: All right. We're ready to go again.

5 MR. RAMSEYER: Thank you, Your Honor. I promise I
6 will move faster.

7 So as to Steve Blevins, if we could go to SB-2.

8 BY MR. RAMSEYER:

9 Q. So, Dr. Bassam, you reviewed all these charts previously;
10 correct?

11 A. That's correct.

12 Q. So I'm not going to go through into every single page.
13 I'm just going to point out a couple things. So on SB-2, the
14 chief complaint. It's right here.

15 A. Yes, sir. Pain all over.

16 Q. Does that mean he gets controlled substances?

17 A. No.

18 Q. And you reviewed that chart. Were those prescriptions to
19 Steve Blevins for legitimate medical purpose and within the
20 scope of professional practice?

21 A. In my opinion they were not.

22 MR. RAMSEYER: All right. Next is Geneva Bowman.

23 And as to that, if we could go to page GB-64.

24 Next page, please.

25 Next page.

1 Keep going, please.

2 Go down here. If we could highlight that.

3 This is on GB-68.

4 BY MR. RAMSEYER:

5 Q. So it indicates for Ms. Bowman, back in 2013 she tested
6 positive for hydrocodone. She has an old prescription
7 warning: Next time would be a failure; is that correct?

8 A. Yes.

9 Q. Again, that would be before she even saw Dr. Smithers;
10 correct?

11 A. Yes, sir, that's correct.

12 Q. Then in October '14, she had a failed drug screen for
13 being negative for morphine and oxycodone; do you see that?

14 A. Yes, I do.

15 Q. Down here is this interesting note. July 20, 2015. Can
16 you read that?

17 A. "Patient seen for first time today since Charleston
18 Clinic closure. Unable to find old file, so."

19 Q. That's dated 7-20 of '15; is that correct?

20 A. Yes, it is 7-20-15.

21 Q. And if you look at the prescriptions for Geneva Bowman,
22 the counts charged begin in October of 2015; is that correct?

23 A. That's correct.

24 Q. And they continue all the way to July of 2016; is that
25 correct?

1 A. That's correct.

2 MR. RAMSEYER: And if we can go to GB-70.

3 70. That's 60. I'm sorry.

4 Sorry, that's not the page I was looking for.

5 So might be 69.

6 BY MR. RAMSEYER:

7 Q. In any event, as to Geneva Bowman -- and let me ask you
8 this. On some of these charts, I'm going to point out failed
9 urine drug screens, things like that. Just assume they didn't
10 fail any drug screens, like all their urine drug screens were
11 good, all their PMPs were good, would these prescriptions be
12 for legitimate medical purpose and within the scope of
13 professional practice?

14 A. No, they would not.

15 Q. And why is that?

16 A. Because they weren't for a legitimate medical purpose in
17 the first place. There's no documentation of any significant
18 pathology that a physician would reasonably assume is causing
19 severe pain. Furthermore, there is no other attempt made to
20 make an accurate diagnosis or offer -- examine a patient and
21 offer an accurate diagnosis and treatment plan.

22 Q. Are these patients being helped in the way a physician
23 would help a patient?

24 A. Not in my opinion, no. They're not being helped, not in
25 the way a physician takes care of a patient.

1 Q. So, again, the prescriptions -- to save time, I'm not
2 going to ask you as to each patient. We'll wait until we get
3 to the end and you've actually testified about all of them
4 before.

5 MR. RAMSEYER: So let's move on to Jason Bowman.

6 So for Jason Bowman, page 37.

7 Again, highlight that, please.

8 BY MR. RAMSEYER:

9 Q. Patient says -- so does it indicate the Opana was
10 prescribed twice a day, but he took it -- is that three times
11 a day?

12 A. Three times a day.

13 Q. For 14 days.

14 A. For 14 days.

15 Q. Due to pain. Is that right?

16 A. That's correct. "This past month due to increased pain,
17 patient reports it's possibly due to increased activity and
18 change in the weather, pain in the neck and midback is
19 continued and concerning to her because it has worsened."

20 Q. It's probably him; right? Concerning to him?

21 A. Him, sorry. He feels it has worsened.

22 Q. That was on November 12, 2015. Again, is that a reason
23 to change the dose or even continue the patient on these
24 drugs?

25 A. No. Quite the opposite, in fact.

1 Q. Okay. So what happens, he comes in on November 12 with
2 that situation. And prior to that on September 11th, he had
3 received morphine sulfate 15 milligrams, 90 pills, and
4 oxycodone 30 milligrams, 90 pills. And the doctor puts him on
5 oxymorphone 30 milligrams; is that right?

6 A. So he increases the medications.

7 Q. Right. Is that on the chart?

8 A. Yes, it is on the chart.

9 Q. And on October -- excuse me, on December 14th, he
10 increases the oxymorphone from 30 milligrams to 40 milligrams
11 per day -- I mean, per pill; is that correct? That would be
12 Count 84.

13 A. Count 84 is for oxymorphone 40 milligrams, 90 pills for
14 30 days. That represents an increase from the prior
15 prescription of oxymorphone, which was for 30 milligrams per
16 pill.

17 Q. All right.

18 MR. RAMSEYER: If we could go to JB-119, please.

19 BY MR. RAMSEYER:

20 Q. And this shows medications prescribed.

21 A. Yes. Oxycodone, oxymorphone, as well as Neurontin and
22 Zanaflex.

23 Q. All right. And the patient is positive for
24 Buprenorphine.

25 A. That's correct. That's a controlled substance that was

1 not prescribed by the doctor.

2 Q. And that was June 14th of 2016. Does he continue to get
3 drugs into July and August?

4 A. Yes, he does.

5 Q. Continues to get oxycodone and oxymorphone; is that
6 correct?

7 A. That's correct. And the oxycodone on this urine drug
8 screen, June 14, 2016, is also noted to be negative.

9 Q. So he's not positive for the drug he's taking. He's
10 positive for some drug he's not being prescribed; is that
11 right?

12 A. Yes, that's correct.

13 MR. RAMSEYER: All right. Let's go to Deborah
14 Brown.

15 On page 1, it's an MRI.

16 BY MR. RAMSEYER:

17 Q. So let me ask you this. Just as a general matter, if a
18 person gets an MRI, does that mean they should be getting
19 Schedule II controlled substances?

20 A. No, not necessarily. Not automatically, certainly not.

21 Q. Because sometimes an MRI shows that nothing is wrong.

22 A. An MRI shows a very detailed picture of the anatomy in
23 question that you're looking at.

24 Q. Right. But, I mean, it could show nothing wrong or it
25 could show something, there's something there, but it doesn't

1 justify controlled substances; right?

2 A. Yes, that's accurate. That's correct.

3 Q. So if you look at the report here, this was dated
4 February 11 of 2014. And Deborah Brown comes to Dr. Smithers,
5 according to the chart, on August 31st of 2015. So that's
6 about a year and a half after that; is that right? Go from
7 February '14 to August of '15?

8 A. Yes. My first prescription for Deborah Brown on my page
9 is --

10 Q. September 1.

11 A. September 1, 2015, that's correct.

12 Q. Correct. Okay. And if you look at the MRI report, if
13 you go down to the impression down here, it says, "Mild
14 multi-level spondylosis."

15 A. Yes, that's correct.

16 MR. RAMSEYER: Okay. And if we go to the next page.

17 And go to the next page, please.

18 BY MR. RAMSEYER:

19 Q. So this is another one, radiology report. Go to the
20 impression of the radiology report, what does it show?

21 A. No acute abnormality.

22 Q. So what do these MRIs and X-rays tell you?

23 A. Very little. I would point out that this is a
24 48-year-old female at the time of the MRI that was previously
25 looked at. On the screen right now is an X-ray of the hip

1 that shows no acute abnormality. But you have to appreciate
2 that these MRIs are very, very detailed pictures. And in this
3 case of a person's spine of a 48-year-old, nobody, practically
4 nobody above the age of about 30 has a perfect looking spine.
5 So it would be unusual, in fact, to see an MRI of someone who
6 is 48 of their spine and have zero evidence of any
7 degeneration or aging.

8 So what's reported on that MRI, and we don't have
9 the benefit of the pictures, but what the radiologist has
10 interpreted and reported is entirely consistent with a normal
11 degenerative aging of a 48-year-old's spine and would
12 certainly not be an appropriate basis or justification for the
13 prescription of high-level chronic narcotics.

14 MR. RAMSEYER: All right. Let's go to Clayton
15 Colegrove.

16 CC-1, page 18, please.

17 BY MR. RAMSEYER:

18 Q. And up here where it talks about the pain. It says, "I
19 hurt all the time." So, again, is that justification for
20 controlled substances being issued to him repeatedly?

21 A. No. Not an isolation like this. That by itself is not
22 justification for narcotics.

23 MR. RAMSEYER: If we can go to CC-1, page 9.

24 BY MR. RAMSEYER:

25 Q. And, again, he's positive for Buprenorphine; is that

1 correct?

2 A. That's correct.

3 Q. Again, according to Dr. Smithers's records, he's not
4 being prescribed Buprenorphine, is he?

5 A. That's correct.

6 Q. And it's a Schedule III controlled drug; correct?

7 A. It is.

8 Q. After that he gets prescriptions in July, August,
9 November of 2016; is that correct?

10 A. That's correct.

11 Q. For oxycodone and oxymorphone; is that right?

12 A. Yes, sir.

13 MR. RAMSEYER: If we go to Janet Craycraft. On
14 page 2. Here it says --

15 Go down, I'm sorry. Wrong part.

16 It's this one.

17 BY MR. RAMSEYER:

18 Q. So the patient says they're taking drugs not prescribed
19 for you.

20 A. Yes.

21 Q. Is that a red flag of potential abuse?

22 A. It is a red flag.

23 MR. RAMSEYER: All right. So let's go to Timmy
24 Damron. To TD-19.

25 It's another urine drug screen.

1 Scroll back out. I'm sorry.

2 The date, May 19th, 2015. I should go to here. So
3 it shows it's actually a lab report from Hope Clinic in
4 Wytheville, dated collected on May 19 of 2015.

5 And if you could go to the next page.

6 Go to 19, I'm sorry.

7 BY MR. RAMSEYER:

8 Q. So drugs prescribed are oxycodone and gabapentin; do you
9 see that?

10 A. Yes, sir.

11 Q. And down here it shows positive for hydrocodone. So that
12 would be a drug not prescribed; correct?

13 A. That's correct. That was not prescribed.

14 Q. Again, that's a red flag of someone that's abusing drugs?

15 A. It is.

16 MR. RAMSEYER: Hassel Daniels. If we can go to
17 page 120.

18 I'm sorry, it's just HD-120, not HD-1. Just HD.

19 So it says, "Darryl Williams gave this fax number to
20 send my information from Hassel Daniels's birth date," blah
21 blah.

22 BY MR. RAMSEYER:

23 Q. Now, doctor, when you made your opinion that these
24 prescriptions were not within the scope of professional
25 practice and they weren't for a legitimate medical purpose,

1 did you base that just on your review of the files?

2 A. Yes, sir, that's all I had.

3 Q. I want to tell you some facts that came out in evidence
4 and ask if that changes your opinion in any way. There's
5 been evidence introduced that Darryl Williams would send money
6 to Dr. Smithers to pay for the office visits of other
7 patients. Would that change your view of whether these were
8 for legitimate medical purpose or not?

9 A. No, it wouldn't.

10 MR. WILLIAMS: Your Honor, I would object as to
11 speculation.

12 THE COURT: Well, I'll overrule the objection.

13 I guess, Mr. Ramseyer, if you would -- I think it
14 would be more proper to ask the witness if he assumed. I
15 mean, whether or not the facts introduced into evidence will
16 be accepted is not known.

17 MR. RAMSEYER: Thank you, Your Honor.

18 BY MR. RAMSEYER:

19 Q. So, Dr. Bassam, if there were -- just for the sake of
20 argument, if you assume that Darryl Williams was sending money
21 to Dr. Smithers to pay for other patients' office visits, some
22 of these patients we've been talking about, would that change
23 your opinion in anyway?

24 A. I'm assuming these are unrelated people, so it would only
25 enforce my opinion.

1 Q. All right. And let me ask you. You've reviewed files
2 before for other doctors?

3 A. Yes, sir.

4 Q. In reviewing these files of Dr. Smithers, is it a close
5 call as to whether it's within the scope of professional
6 practice?

7 A. No, in my opinion it's not a close call.

8 Q. All right.

9 MR. RAMSEYER: So for Hassel Daniels, let's go to
10 September 5th of 2016. And that would be page HD-20.

11 BY MR. RAMSEYER:

12 Q. All right. So if you look at chart 107 that you have
13 there, the exhibit, Hassel Daniels has been receiving
14 oxycodone every month from April 28, June 2nd, June 30th,
15 August 4th, September 5th. And on September 5th he's tested
16 for oxycodone and he's negative; correct?

17 A. That's correct.

18 Q. He's also been prescribed oxymorphone. He's positive for
19 that; correct?

20 A. That's correct.

21 Q. So the next visit, or the next prescription appears to be
22 November 14th, and he gets oxymorphone 60. So, again, a
23 negative oxycodone screen. What does that tell you when
24 you're getting a prescription for oxycodone?

25 A. It's concerning. It should be there. He's prescribed 45

1 tablets of oxycodone to be taken for 30 days. And assuming
2 that this person has pain on an every-day basis as they're
3 purporting, then one would anticipate that medication to be
4 there. Instead, it's not there, meaning he hadn't taken it
5 for at least three to four days.

6 MR. RAMSEYER: All right. Let's go to Robert
7 Daniels.

8 So let's go to RD-41.

9 RD-41, please.

10 BY MR. RAMSEYER:

11 Q. Again, looking at your chart 107. He's been receiving
12 oxycodone and oxymorphone since September 2015. This lab
13 report is dated December of 2015. Do you see that?

14 A. Yes.

15 MR. RAMSEYER: All right. I'm going to go then to
16 the bottom of that page.

17 Can we go to page 41, please.

18 Can we scroll down.

19 I'll need to get the original.

20 Just going to the next page, if you don't mind.

21 Go to the next page.

22 All right.

23 We'll get the original for the jury.

24 BY MR. RAMSEYER:

25 Q. But assuming that on December 21st he was negative for

1 oxycodone. Again, she continued to get these drugs?

2 A. Yes. Despite being negative on the urine screen, the
3 prescribing of medication continues.

4 Q. And should that happen?

5 A. No. There should be a much more thoughtful process as to
6 figuring out why the abnormal drug screen.

7 MR. RAMSEYER: All right. Let's go to Donna Dotson.

8 Let's go to DD-2, 18.

9 DD-2, page 18, please.

10 Actually, skip that. Let's go to DD-2, page 30.

11 And this is one of these Brief Pain Inventories.

12 You've already testified this isn't really that useful. But
13 let me go to the end of that.

14 So if we go to page 31.

15 Page 32.

16 Page 33.

17 BY MR. RAMSEYER:

18 Q. And down here for "reviewer," does it indicate anybody
19 has even reviewed it?

20 A. No, it would appear not.

21 MR. RAMSEYER: All right. And if we could go to
22 DD-2, page 24.

23 This is May 9th of 2017. So it's the next month.

24 Let me go to the last page of that.

25 ///

1 BY MR. RAMSEYER:

2 Q. Again, does it appear anybody's even reviewed it?

3 A. No, it does not appear to be reviewed.

4 MR. RAMSEYER: All right. Stephen Fearin. Let's go
5 to SF-7.

6 So let's highlight this. Bring that up.

7 BY MR. RAMSEYER:

8 Q. So the driver's license said he's from Wallingford,
9 Kentucky. And according to this, his date of birth is 1988.
10 Makes him, in 2015, 27 years old, approximately; is that
11 right?

12 A. Yes, sir.

13 Q. Is that -- does that mean anything to you as a doctor
14 when you're talking about controlled substances?

15 A. Yes, he was a young man. What could he possibly have
16 that's so severe that requires high doses of narcotics?

17 MR. RAMSEYER: And if we could go to SF-7.

18 BY MR. RAMSEYER:

19 Q. So this is a checklist for long-term opioid therapy.
20 Again, anything there that helps you know what's going on or
21 what the basis for the treatment is?

22 A. Nothing here that would assist him that way.

23 Q. All right. Again, I don't want to go through the whole
24 file, but, in general, these files --

25 I won't ask that. I asked it before.

1 MR. RAMSEYER: Let's go to Brenda Fisher.

2 So if we go to BF-1, page 7.

3 BY MR. RAMSEYER:

4 Q. So the medication prescribed is OC-IR?

5 A. Yes, sir.

6 Q. So she's positive for oxycodone. That's the first
7 prescription we have issued is on that date, November 17 of
8 2016. And, again, with Brenda Fisher. It's November, she
9 gets oxycodone and oxymorphone. December, oxycodone,
10 oxymorphone. January, oxymorphone. February, oxycodone and
11 OxyContin. And if you look at BF-1, page 25. The Brief Pain
12 Inventory dated December 15th of 2016.

13 MR. RAMSEYER: Can you scroll.

14 BY MR. RAMSEYER:

15 Q. Again, does it appear that anybody has even reviewed it?

16 A. It would appear no one has reviewed this.

17 Q. What does it tell you when there's stuff in the chart and
18 doesn't look like it's being used to guide any kind of
19 practice?

20 A. It's concerning. I mean, it's just papers on the chart
21 that have no meaning and certainly no useful purpose,
22 medically speaking.

23 MR. RAMSEYER: All right. Let's go to Candy George.

24 So CG-38.

25 ///

1 BY MR. RAMSEYER:

2 Q. So she's been -- this is back, again, it's from Hope
3 Clinic, May 19th of '15. So it's before she's seen by
4 Dr. Smithers, but it's in his charts.

5 A. Yes, sir.

6 Q. Patient's medications prescribed, oxycodone and Zanaflex,
7 and positive for hydrocodone.

8 A. Yes. Medication which was not listed as being
9 prescribed.

10 Q. Okay. And there's a note there, "Patient advised this
11 was an ER visit," which is in her Wytheville chart. Do you
12 see that?

13 A. Yes, I see that.

14 Q. And in August she gets MS Contin, oxycodone. September
15 she gets oxycodone, morphine sulfate.

16 MR. RAMSEYER: Let's look at her New Patient Intake
17 Form, which is CG-12.

18 BY MR. RAMSEYER:

19 Q. And do you see at the bottom, again, any indication
20 anybody's looked at it?

21 A. No. No, sir. No indication anybody has looked at it to
22 review it.

23 MR. RAMSEYER: Let's go to Bryan Harlow. And if you
24 go to page 6. And down here, if we highlight this.

25 ///

1 BY MR. RAMSEYER:

2 Q. "Have you ever received treatment in a methadone or
3 Suboxone treatment center?"

4 A. "Yes." The patient responded in the affirmative.

5 Q. Okay. When you get treatment at a methadone or Suboxone
6 treatment center, what's that treatment for?

7 A. That's for addiction to opiates, or abuse.

8 Q. All right. So, according to this, Dr. Smithers is aware
9 of this on October 1st of 2015. And so what does he prescribe
10 to him on October 1st of 2015?

11 A. He prescribes the medications that he's addicted to.

12 Q. Prescribes oxycodone 30 milligrams, 60 pills, and
13 oxymorphone 30 milligrams, 60 pills; is that right?

14 A. Yes.

15 Q. And that continues, October, November, January, another
16 prescription in late January, February.

17 MR. RAMSEYER: So if we can go to BH-31.

18 And highlight this.

19 BY MR. RAMSEYER:

20 Q. This is dated June 12 -- or, excuse me. March 24th,
21 2016. Can you read that?

22 A. Yes. It looks to be some kind of descriptions of patient
23 reports of pain. Number 1 is pointing to the back of the
24 right shoulder. And notation is made that, "Last MRI was in
25 2013. Since then had rotator cuff repaired. However, pain

1 has worsened."

2 Another note, "Seeing new PCP this month for X-rays
3 and/or ortho referral."

4 Number 2 is a description -- is pointing to the low
5 back on the diagram. And the notation, "Left greater than
6 right and the symptoms the patient is describing are worse on
7 the left." And the doctor's note, "Seeing a neurologist for
8 worsening pain and numbness in the low back and legs. Left
9 greater than right."

10 Q. All right. And what does this mean to you?

11 A. This is just capturing what the patient's reporting in
12 terms of their symptoms. It is also capturing what the
13 patient is telling the physician he's planning on doing for
14 these things. So patient's reporting that they're going to be
15 getting the new primary care physician sometime this month and
16 will be asking them for X-rays to look into shoulder and
17 perhaps a referral to an orthopedic doctor. And similar
18 things are being said to the doctor about the low back and
19 seeing a different doctor for these worsening symptoms in the
20 low back and legs.

21 Q. Okay. But what does it tell you about Dr. Smithers?
22 What's his role as a doctor, according to these charts?

23 A. I'm not sure. This is confusing to me. There's nothing
24 that prevents Dr. Smithers from making an X-ray request, or an
25 orthopedic referral, or for referring for -- get a

1 consultation or testing for the worsening low back pain
2 complaints from the patient. There's nothing that prevents
3 the doctor in this encounter from following up on these and
4 directing them.

5 Q. So, I mean, from the charts and things like this, what
6 does it appear Dr. Smithers is providing?

7 A. Just simply documentation of the patient's report of pain
8 and prescriptions for narcotics.

9 Q. All right. And if you look to BH-24. So the doctor has
10 prescribed non-controlled substances. What does this
11 indicate?

12 A. It indicates that the non-controlled substances were not
13 filled, only the controlled substances, the narcotics were
14 filled of the prescriptions that were written.

15 Q. All right. And what is that a sign of?

16 A. That's, I think, another example of the kind of behavior
17 you would see in someone whose intent is to misuse, abuse, or
18 divert narcotic controlled substances.

19 MR. RAMSEYER: All right. That's May 23rd of 2016.
20 Let's go to July 18th of 2016, BH-16.

21 MR. WILLIAMS: Your Honor.

22 THE COURT: Yes, sir.

23 MR. WILLIAMS: I'm going to object on that last
24 question as to speculation.

25 THE COURT: Well, I'm going to overrule the

1 objection. The witness has shown his qualifications as a pain
2 management expert. But he is expressing an opinion consistent
3 with that expertise.

4 MR. RAMSEYER: All right. Let's go ahead -- let's
5 go to --

6 THE COURT: Ladies and gentlemen, let me add to
7 that. Again, you are the judge of all of the testimony in
8 this case. I'm simply admitting that testimony for your
9 consideration.

10 Go ahead, Mr. Ramseyer.

11 MR. RAMSEYER: Let's go to John Greg Harlow. Page
12 JHa-9.

13 Page 9, please.

14 Let's go Pamela Harlow.

15 Let's go to PH-1000. Can we do that?

16 Let's go to PH-6.

17 BY MR. RAMSEYER:

18 Q. And it shows the medications prescribed. Is that
19 diclofenac, gabapentin, oxycodone and Zanaflex? Do you see
20 that?

21 A. Yes, sir.

22 Q. May 18th, 2016. And she is --

23 MR. RAMSEYER: Go down here.

24 BY MR. RAMSEYER:

25 Q. She's negative for gabapentin, negative for oxycodone,

1 and positive for oxymorphone. Do you see that?

2 A. That's correct.

3 MR. RAMSEYER: If we can go to the next page.

4 Next page.

5 Next page.

6 All right. So she goes into a high-risk contract.

7 Down here is this sticky note on the same page. It's dated
8 6-14 of '16. If we can go to that, please.

9 BY MR. RAMSEYER:

10 Q. It says, "Darryl Williams, OP-ER prescription from Pam
11 Harlow on 4-22-16. He or she will provide the original RX."
12 What does that tell you?

13 A. It's hard for me to opine on this. Darryl Williams is
14 not the patient that we're talking about, so I don't
15 understand why this person has anything to do with Pam
16 Harlow's prescriptions.

17 MR. RAMSEYER: All right. If we can go to PH-12.

18 BY MR. RAMSEYER:

19 Q. And it is for June 14th of '16. It says, "First DT
20 inconsistency for negative meds." Again, what does it mean if
21 your urine screen is showing negative if you're get -- in this
22 case she was getting oxycodone, oxymorphone?

23 A. The patient's being prescribed narcotics, oxycodone and
24 oxymorphone, for severe pain. And when a drug test, urine
25 test is administered and analyzed for the presence of

1 medication and there's none there, that means the patient at
2 the very least has not taken the medication for three to four
3 days.

4 Q. All right.

5 A. I'm sorry. Further I would state that it should raise
6 serious questions in the provider's mind about the ultimate
7 disposition of these medications and how they're being used.

8 MR. RAMSEYER: Okay. If you go to HH-2, for Heather
9 Hartshorn.

10 BY MR. RAMSEYER:

11 Q. Okay. It's got the medication record. Do you see that?

12 A. Yes, sir.

13 MR. RAMSEYER: And on the little sticky note, if we
14 could blow that up.

15 BY MR. RAMSEYER:

16 Q. "Patient will bring all RXs next month, 2-20-17."

17 A. Yes, sir.

18 MR. RAMSEYER: All right. And if we could go to
19 HH-70.

20 It's another one of those Brief Pain Inventories.
21 This one doesn't even have a date.

22 Go to the next page, please.

23 Next page.

24 Next page.

25 ///

1 BY MR. RAMSEYER:

2 Q. Again, does it indicate any medical person's reviewed it?

3 A. No, sir.

4 Q. Not anyone.

5 MR. RAMSEYER: All right. Let's go to Bobby
6 Hopkins. Let's go to BH-01, page 14.

7 BY MR. RAMSEYER:

8 Q. So this is an Agreement For Opioid Maintenance Therapy.
9 Do you see that?

10 A. Yes.

11 MR. RAMSEYER: And you can go to page 15.

12 BY MR. RAMSEYER:

13 Q. So it appears to be dated on October 29 of 2015. It
14 says, "The above agreement has been explained to me by
15 Dr. Smithers." Do you see that?

16 A. Yes, sir.

17 MR. RAMSEYER: If you go back to the previous page,
18 page 14. If you highlight Number 2 there.

19 BY MR. RAMSEYER:

20 Q. So does it say, "You must use only one pharmacy to obtain
21 all opiate prescriptions and adjunctive analgesics prescribed
22 by your physician." And there's a place to put in where that
23 pharmacy is going to be; correct?

24 A. Yes, sir.

25 Q. Is it filled in?

1 A. It's blank.

2 Q. So, again, what does that tell you?

3 A. This form is not serving its purpose. It's not being
4 filled out correctly. It is standard practice to ask that one
5 pharmacy be used for filling controlled substances for
6 recordkeeping purposes. And that if that's not possible, for
7 there to be some communication documented as to why that's not
8 possible. In this case, it's simply left blank.

9 MR. RAMSEYER: All right. Let's go to Sam Hubbard.

10 SH-13. It's dated December 23rd of 2015.

11 And let's go down to the bottom here.

12 If you could highlight, "The patient does not recall
13 taking an OC-IR prior to this UDT. But as we review it almost
14 six months later, he's unsure how it was in his system."

15 THE WITNESS: Yes, this is inconsistent. This is a
16 drug screen. The medication being prescribed is not found.
17 The second one appears that this was actually ordered and
18 received -- collected, ordered, and received in December of
19 2015, but was not reviewed by the physician until months later
20 in May of 2016.

21 BY MR. RAMSEYER:

22 Q. It indicates WW reviewed it May 18th of '16.

23 A. Yes. I'm sorry, I'm not familiar with WW. But that's --

24 Q. Right. Then we go to the next page. There it
25 indicates --

1 A. Yes. This is Dr. Smithers's signature dated May of 18.
2 On the urine drug screen from approximately six months prior,
3 "Patient reports may have been given Tramadol in the ED just
4 prior to this urine drug screen." And then a note at the
5 bottom, "Delayed review due to system down."

6 Q. Right. So, as a doctor, if you order lab tests done, do
7 you wait five months to look at it? or six months to look at
8 it?

9 A. No. We'd be looking at it as it comes in and certainly
10 considering it, at the latest, at the time of the next visit
11 of the patient when they're back in front of you.

12 MR. RAMSEYER: All right. Let's go to Sam Hubbard
13 again, for SH-8.

14 And if you highlight the description down there at
15 the bottom.

16 BY MR. RAMSEYER:

17 Q. So at the top it says, "First failure, UDT." That means
18 urine drug test; is that right?

19 A. Yes, sir.

20 Q. So 5-18-16 it was positive for Valium metabolites.
21 Valium was not prescribed. "Patient states it was given to
22 him in the hospital before his May 2016 visit. He advised he
23 would bring in the paperwork from the hospital on the June
24 2016 visit. First failure assigned. Patient moved to
25 moderate risk. 6-21-16. WW."

1 Then Dr. Smithers, if you can read what's above his
2 handwriting there.

3 A. Yes, sir. It appears Dr. Smithers wrote and signed this
4 on August 31st, 2016. "Patient failed to show for most recent
5 appointment due to financial issues. Raise to high-risk
6 contract due to poor judgment in letting a discharged patient
7 from this practice fill his last prescription."

8 Q. Okay. And, again, is that something you see? Is that a
9 typical kind of thing, a doctor's note?

10 A. I'm confused by this notation. The second sentence, I
11 don't know what relationship it has to the first sentence.
12 The first sentence I can understand a little bit easier. It's
13 rather straightforward. Really the second sentence, "raised
14 to high-risk contract due to poor judgment in letting fill his
15 last prescription -- last prescription or lost prescription.
16 I'm not sure. If it says "lost prescription," and that's --
17 if that's what had indeed happened, then that's, in my
18 opinion, the kind of behavior that's evidenced with someone
19 whose intent is to abuse medications rather than use them for
20 a medical purpose.

21 If it says, "filled his last prescription," then I'm
22 just frankly confused by this sentence.

23 Q. Okay. So if you look at Sammy Hubbard's prescriptions,
24 November 2015 all the way through September of 2016, Dilaudid.

25 A. Yes, sir.

1 Q. Which is Hydromorphone; is that right?

2 A. Yes, sir.

3 Q. Oxymorphone, oxycodone, month after month; correct?

4 A. Yes, sir, that's correct.

5 Q. And so after this note, August 31st, he gets a
6 prescription on September 29. It's one of these titrating
7 doses, appears to be, if you look at -- is that correct? If
8 you look at Counts 326 through 329, if you can just explain to
9 the jury what your opinion of that is.

10 A. I'm not sure -- sorry, can you ask that last question
11 again. What am I looking at?

12 Q. Counts 326 through 329.

13 A. Yes, sir.

14 Q. And you can see that there appear to be four
15 prescriptions issued for oxycodone on the same day?

16 A. Yes, that's correct.

17 Q. One's for 28, one's for 21, one's for 14, and one's for
18 seven. And based on your review of the charts and just your
19 general knowledge, what does that appear to be?

20 A. I'm going to assume it was a titrated schedule for the
21 medications to be discontinued over the course of four weeks.

22 MR. RAMSEYER: So if you go to SH-1.

23 BY MR. RAMSEYER:

24 Q. So there's a discharge titration note that's dated
25 September 29.

1 A. Yes, sir.

2 Q. So, again, doesn't this show Dr. Smithers tried to do
3 everything right? He finds out somebody is doing something
4 and he gets rid of them.

5 A. No, I would not agree with that statement.

6 Q. Should this person have ever got controlled substances
7 from Dr. Smithers?

8 A. Not from what I can determine in the first place.

9 MR. RAMSEYER: Go to DJ-1, page 3, please. Deanna
10 Jessie. Page 3.

11 It's got a Post-it note here, if you can highlight
12 that.

13 BY MR. RAMSEYER:

14 Q. "Will bring kidney stone records. Patient reminded to
15 bring bottles." Again, what is that telling you? Or what is
16 that? Is there any significance to that?

17 A. It appears that the doctor's basing the prescriptions for
18 pain on the patient having a diagnosis of a kidney stone,
19 except a kidney stone passing is a time-limited event and
20 would not be reasonably considered to be a cause of ongoing
21 severe chronic pain requiring chronic narcotics.

22 Q. All right.

23 MR. RAMSEYER: Your Honor, I'm trying to move
24 through as quickly as possible.

25 Go to page 15, NJ-15. Neil Jewell, 15, please.

1 Highlight this.

2 BY MR. RAMSEYER:

3 Q. This is for patient Neil Jewell. Indicates they did a
4 criminal records check and he was convicted of possession with
5 intent to deliver narcotics in 2012. Do you see that?

6 A. Yes, sir.

7 Q. Did Dr. Smithers prescribe narcotics for him after
8 becoming aware of that? This was 9-28.

9 A. Yes, sir, he did.

10 Q. Prescribed oxycodone and oxymorphone?

11 A. Yes, on October of 2015, November of 2015.

12 MR. RAMSEYER: Let's go to Lora Kicklighter. So
13 LK-5.

14 And go right here. This is December 2nd of 2015.

15 BY MR. RAMSEYER:

16 Q. Okay. It says "track marks."

17 "Yes, right wrist, left hand." Can you explain to
18 the jury what track marks are?

19 A. In this context we're talking about markings on a
20 patient's arm that are consistent with IV, intravenous,
21 injection of drugs and narcotics.

22 Q. So these drugs that Dr. Smithers was prescribing for
23 these different people that you've looked through these
24 charts, were they drugs that should be taken intravenously by
25 injection?

1 A. No, sir, not at all.

2 Q. If you see that they're being taken intravenously, what
3 does that tell you about the patient?

4 A. I think if you see evidence of active drug addiction
5 problem going on, you need to be very aware and act
6 appropriately in a patient before prescribing them narcotic
7 medications. This is evidence of an ongoing and active drug
8 addiction problem.

9 Q. All right. And that's November 5th of 2015.

10 MR. RAMSEYER: Can you go to LK 37.

11 BY MR. RAMSEYER:

12 Q. On that same date, November 5th, 2015, this indicates
13 that she had a charge of trafficking in illegal drugs, 4 to
14 14 grams. Do you see that?

15 A. Yes, sir, I do.

16 Q. It indicates Dr. Smithers saw that on November 5th, 2015.
17 Do you see that?

18 A. Yes, sir, I see that.

19 Q. And did he issue a prescription to her on November 5th of
20 2015?

21 A. Yes, and then subsequent to those dates.

22 Q. Okay. And what did he prescribe to her? Knowing this
23 person had charges of trafficking and had track marks on her
24 hand, what did he prescribe for her?

25 A. It might be strong evidence that this person is

1 struggling with an addiction problem. If you care about this
2 person, you identify that and refer that appropriately for
3 evaluation and treatment of their addiction.

4 Q. But instead, what did Dr. Smithers prescribe for her?

5 A. He prescribed the medications that she's showed an
6 addiction to.

7 Q. Well, was it oxymorphone 40 milligrams three times a day?

8 A. Yes, sir.

9 Q. So that's 120 milligrams of oxycodone per day prescribed
10 to this person.

11 A. Yes, sir.

12 MR. RAMSEYER: If you go to December 2nd. Excuse
13 me.

14 BY MR. RAMSEYER:

15 Q. And she continued to get -- after December, she got
16 oxymorphone, Opana from Dr. Smithers in January, January 4th,
17 January 29th, February 26th, March 31st, April 4th, May 2nd --
18 excuse me, let me back up. That April 4th was oxycodone.

19 A. Yes, sir.

20 Q. May 2nd, Opana, oxymorphone. June 6th, oxymorphone; is
21 that correct?

22 A. Yes, sir.

23 Q. And then she got a discharge in July of 2016; is that
24 right? If we go to page 6. According to the chart, anyway,
25 she's discharged July 5th.

1 A. Yes, sir.

2 Q. When she's discharged, she's given some more oxycodone to
3 take home with her; is that right?

4 A. That's correct.

5 Q. Doctor, again, for the sake of trying to move things
6 along, I'm not going to go through all these reports. There
7 are MRIs, there are X-rays, there's things like that; is that
8 right?

9 A. There are.

10 Q. Do any of those things justify the controlled substances
11 that Dr. Smithers wrote for these people?

12 A. I did not see any objective evidence of the patient's
13 condition, including the MRIs and X-rays, that would justify
14 the prescriptions of high-dose chronic opiates.

15 Q. All right.

16 MR. RAMSEYER: Your Honor, I have one more set of
17 questions, if I can just ask a quick question of my colleague.

18 BY MR. RAMSEYER:

19 Q. So I'm going to skip to Darryl Williams.

20 Darryl Williams, according to your chart in front of
21 you, Exhibit 107, starting at Count 784.

22 A. Yes, sir, 784.

23 Q. On August 31st, he got 120 oxycodone 30s, and 60
24 oxymorphone 40s; --

25 A. Yes, sir.

1 Q. -- correct?

2 And he got those from August of 2015, all the way
3 through -- or he got controlled substances -- Schedule II
4 controlled substances until May of 2016; is that right?

5 A. Yes, sir.

6 MR. RAMSEYER: And if you will look at DWi-41,
7 please.

8 Okay. Go to the next page, please.

9 All right. Highlight this.

10 BY MR. RAMSEYER:

11 Q. So this report indicates he's positive for cocaine use;
12 right?

13 A. Yes, sir, it does.

14 Q. So on December 21st, 2015, he comes in for a test.
15 Positive for cocaine.

16 MR. RAMSEYER: Let's go to DWi-71.

17 BY MR. RAMSEYER:

18 Q. And possession with intent to deliver controlled
19 substance charge in May of 2012; is that correct?

20 A. Yes, that's correct.

21 MR. RAMSEYER: Okay. Go to the next page.

22 Next page.

23 Actually, go back to 71, again. I'd like to ask one
24 question.

25 ///

1 BY MR. RAMSEYER:

2 Q. Again, someone has written on here, indicating someone's
3 viewed it; is that right?

4 A. Yes.

5 Q. So he tests positive for cocaine, has a previous charge
6 of possession with intent to deliver. That's on
7 December 21st. Does he after that get a prescription for
8 oxycodone, oxymorphone, oxycodone, oxymorphone, oxycodone,
9 Opana ER, oxycodone, oxycodone, oxycodone, and oxycodone?

10 A. Yes, sir. The prescribing of the narcotics continues
11 after December 15 for months.

12 Q. Now, doctor, again, you made your decision just based on
13 reviewing patient charts. So I want to show you some other
14 things to have you consider.

15 MR. RAMSEYER: So if we could go to -- on the Darryl
16 Williams's text, if we go to 1,000, page 13.

17 If we could highlight right here, please.

18 BY MR. RAMSEYER:

19 Q. So, assume for your -- based on your opinion, that this
20 is a text message from Dr. Smithers to Darryl Williams, one of
21 the patients.

22 A. Yes, sir.

23 Q. And that it says, "By my -- don't assume, it does say,
24 "By my count -- it lists 18 people as initials. Do you see
25 that?

1 A. Yes, sir.

2 MR. RAMSEYER: If we go on down.

3 BY MR. RAMSEYER:

4 Q. And then Dr. Smithers is saying, "18 x 3 = 54."

5 And assume, again, for your opinion, that that means
6 18 people getting prescriptions, \$300 per person, \$5,400.

7 And Darryl Williams says, "Sounds right."

8 THE COURT: Yes, sir.

9 MR. WILLIAMS: Your Honor, I'm again going to object
10 as speculation. I think we're going into hypotheses here.

11 THE COURT: Certainly. I'll overrule the objection.
12 Go ahead.

13 MR. RAMSEYER: Go on down. Go to the next page
14 please.

15 BY MR. RAMSEYER:

16 Q. Then assume the evidence would be that Darryl Williams
17 wires \$5,400 to Dr. Smithers and Dr. Smithers's wife as
18 payment for those prescriptions. And assume that those
19 prescriptions are then mailed to Darryl Williams and those
20 prescriptions are filled. Would that affect your opinion as
21 to whether these prescriptions were issued for a legitimate
22 medical purpose within the scope of professional practice?

23 A. I can't imagine any clinical medical scenario where that
24 would be appropriate action to take as a physician, no. What
25 your describing is not in any way, shape, or form familiar to

1 the practice of medicine.

2 Q. And you said earlier that it wasn't a close call just
3 looking at the records. What does this do to your opinion as
4 to whether it was a close call?

5 A. It confirms it.

6 MR. RAMSEYER: That's all my questions.

7 BY MR. RAMSEYER:

8 Q. Just in recap, Government's Exhibit 107, you reviewed
9 every one of those prescriptions and in your opinion every one
10 of those was issued outside the scope of professional practice
11 and not for legitimate medical purpose; is that correct?

12 A. Yes, that is correct.

13 MR. RAMSEYER: Thank you.

14 THE COURT: All right. Ladies and gentlemen, we're
15 going to take our luncheon break at this time. If you'll be
16 back in one hour. If you'll follow the bailiff out. Please
17 remember my instructions to you.

18 (Proceedings held in the absence of the jury.)

19 THE COURT: All right. Counsel, is there anything
20 we need to take up before we take our luncheon recess?

21 If not, we'll be in recess for one hour.

22 (Proceedings suspended at 12:07 p.m. and resumed at 1:08
23 p.m.)

24 THE COURT: Are we ready for the jury?

25 MR. WILLIAMS: We are, Your Honor.

1 THE COURT: Go ahead and bring the jury in.

2 (Proceedings held in the presence of the jury.)

3 THE COURT: All right. You may cross-examine,
4 Mr. Williams.

5 MR. WILLIAMS: Thank you, Your Honor.

6 **CROSS-EXAMINATION**

7 BY MR. WILLIAMS:

8 Q. Dr. Bassam, how are you today?

9 A. Well, thank you.

10 Q. Okay. Dr. Bassam, you reviewed these files that the
11 government gave you; correct?

12 A. Yes, sir.

13 Q. And it's about 50-some files; is that right?

14 A. Broken up over the course of a year. He sent different
15 sets.

16 Q. Now, you didn't review all of the files of Dr. Smithers,
17 did you?

18 A. No. I reviewed the files the Government gave me.

19 Q. Okay. And did you get any of the referring doctor files
20 to review? Did you ever view anything -- files that may have
21 been referred to him, did you talk with those doctors or
22 anything?

23 A. No, sir, I have not spoken to anyone.

24 Q. Now, are you familiar with the World Health Organization?

25 A. Yes, sir.

1 Q. Okay. And what is the World Health Organization?

2 A. It's an international health organization.

3 Q. Okay. And are you aware that it defines pain as being
4 subjective? Would you agree with that statement?

5 A. Yes, I would agree that pain is a subjective experience.

6 Q. Okay. In other words, if you and I were to have the
7 exact same injury, the pain level may be different for you
8 versus me, is that kind of what that means?

9 A. I'd say there's some variability in there to a degree.

10 Q. Okay. Now, as far as the referring doctor files, is it
11 possible Dr. Smithers had access to those that you didn't?

12 A. I'm unsure about that.

13 Q. Okay. You talked about some various forms of diagnostic
14 testing; MRIs, and X-rays, and stuff like that; is that
15 correct?

16 A. Yes, sir.

17 Q. Okay. And you indicated those could be done to sort of
18 help supplement to help determine injuries; correct?

19 A. Could be, yes, sir.

20 Q. But now those cost money, don't they?

21 A. They can. Yes, they do.

22 Q. And are you aware of the financial situations of any of
23 these patients?

24 A. I'm not.

25 Q. Okay. Are you aware whether they had insurance or not?

1 A. Only what's on the chart. Sometimes insurance
2 information was in the chart and sometimes it was not.

3 Q. Okay. And is it not fair to say that some insurances and
4 stuff will not cover certain things if testing has already
5 been done?

6 A. No, I wouldn't make that blanket statement.

7 Q. Okay. It's possible that it could be done, but it's --
8 there are times it might be denied because --

9 A. There are times insurance denies care, that's correct.

10 Q. Okay. Now, Dr. Smithers had Opioid Treatment Agreements,
11 didn't he?

12 A. On some of the charts, yes, sir.

13 Q. And on those opioid agreements, the patients agreed to
14 take the medication as prescribed, didn't they?

15 A. Yes. That's standard language in an opiate agreement,
16 medication agreement.

17 Q. And they also agreed to be honest and truthful with him,
18 didn't he?

19 A. I'm afraid I don't know if that's what it says in his
20 agreement. But I wouldn't be surprised if it says such a
21 thing.

22 Q. That's an essential element between a patient and a
23 physician, isn't it?

24 A. It's an important element, yes, honesty when you're
25 discussing your medical condition with your physician.

1 Q. Okay. Were you aware that in Dr. Smithers's agreement it
2 also said you were not allowed to sell or distribute your
3 pills?

4 A. I would not be surprised. Again, that is standard
5 language for a medication agreement.

6 Q. Okay. Now, all the prescriptions that Dr. Smithers gave
7 were all prescribed by the FDA; correct -- or all approved by
8 the FDA.

9 A. They are.

10 Q. And the FDA doesn't limit the amount or anything that can
11 be given by a physician, does it?

12 A. That's correct.

13 Q. Now, I'm going to ask you to look here just a minute, if
14 we can, on the screen. I'm going to show you -- what is this
15 a form of? Does it say?

16 And this is the RB-2, 51.

17 A. So this is a one-page form that's titled, "Initial Pain
18 Assessment Tool."

19 Q. Okay. And with respect to this, what's the name there,
20 if you can?

21 A. The patient's name is Robert Battaglia.

22 Q. Okay. Now, you talked in depth about Robert Battaglia's
23 chart, did you not, earlier?

24 A. We did.

25 Q. Okay. The numbers that are listed right under Robert

1 Battaglia --

2 A. Yes, sir.

3 Q. -- what does that line say right there?

4 A. Diagnosis.

5 Q. Okay. And what do those numbers appear to be to you?

6 A. Those appear to be ICD-9 codes, corresponding to a
7 variety of diagnoses.

8 Q. Okay. So these would be diagnoses that Dr. Smithers has
9 made with respect to this; correct?

10 A. Yes, that's correct.

11 Q. Okay.

12 MR. WILLIAMS: You can take that off. Thank you.

13 BY MR. WILLIAMS:

14 Q. Now, many patients face a choice a lot of times, don't
15 they, with respect to pain?

16 A. I'm sorry, I don't understand your question.

17 Q. Okay. They're -- in other words, certain patients may be
18 offered surgery to help alleviate pain; correct?

19 A. If they have a condition that surgery can help, often
20 that may be the case, yes.

21 Q. All right. But these surgeries, they cost money;
22 correct?

23 A. Yes.

24 Q. They'd have to be approved by insurance.

25 A. Often.

1 Q. Okay. A lot of these patients have back injuries;
2 correct?

3 A. I don't know that.

4 Q. Okay. Would it be safe to say that surgeries pose risks?

5 A. Surgery poses risks, inherently.

6 Q. And so, with this, is it not fair to say that some people
7 may choose not to have surgery on something?

8 A. That may be the case in some people, sure. That would be
9 a conversation and thought process that would typically be
10 memorialized and captured in the chart.

11 Q. Now, with respect to this, it's certainly a person's
12 decision on their own to decide whether or not they want to
13 have surgery; correct?

14 A. Certainly.

15 Q. And they may choose to have a long-term treatment with
16 medication in lieu of surgery, could they not?

17 A. I suppose people could choose to take pain medications
18 forever or for long periods of time instead of surgery. I
19 suppose that could be a choice.

20 Q. Okay. And so they may choose the risk of possible
21 dependency over the long-term effects of having surgery;
22 correct?

23 A. Risk of dependency and other risks, including death.

24 Q. Now, did you know Dr. Smithers -- do you know what
25 Dr. Smithers's training or anything is in pain medication?

1 A. I do not.

2 Q. And, now, let me go into another instance there that we
3 talked about earlier.

4 MR. WILLIAMS: If we can put this up on the screen.

5 This is DWi-71.

6 BY MR. WILLIAMS:

7 Q. Talked a little bit earlier there about Darryl Williams.

8 A. Yes, sir.

9 Q. And one of the things you talked about here was a
10 conviction that he had back in 2012; is that correct?

11 A. It looks like it's a charge and dismissal.

12 Q. Okay. That was -- you got my next question. In other
13 words, that charge that was showing was dismissed; correct?

14 A. Yes, sir.

15 Q. You had said earlier it caused you concern. But the
16 charge was actually dismissed, was it not?

17 A. Yes.

18 Q. Okay. Now, many of these patients had been to other
19 doctors, had they not?

20 A. It would appear so, yes.

21 Q. Okay. And so sometimes these have been referred to
22 Dr. Smithers; correct?

23 A. I'm not certain about that. I didn't see any direct
24 referrals of that nature.

25 Q. But now isn't it true that certainly other doctors may

1 not have been able to make diagnoses either; correct?

2 A. I suppose that's true, although I saw no records like
3 that.

4 Q. Okay. When a patient has had chronic severe pain, and
5 they've already had an MRI, isn't it true that a lot of times
6 that's not necessary to repeat?

7 A. Well, that's true. It's not necessary to repeat in all
8 cases just because of time having gone by.

9 Q. Okay. In other words, if a specialist or radiologist or
10 something has already looked at it and made a determination,
11 it could be possible that that wouldn't need to be repeated;
12 correct?

13 A. It's possible that it doesn't need to be repeated.

14 Q. Now, on Dr. Smithers's pain form, do you recall --

15 A. I'm sorry, the pain what?

16 Q. The pain form.

17 A. The pain form. Which one?

18 Q. The short form.

19 A. The Brief Pain Inventory. Thank you.

20 Q. Actually, let's go back. Let's do the initial.

21 A. Okay. Initial Pain Assessment Tool.

22 Q. Initial pain. One of the things Dr. Smithers asked on
23 that is alternative testing that's already been done for the
24 patient, did he not?

25 A. That's one of the things listed on the form.

1 Q. In other words, he asked if he'd already had physical
2 therapy; correct?

3 A. Yes, that's one of the options listed on the form for the
4 patient to fill out.

5 Q. Okay. Asked if hot and cold packs worked?

6 A. If that's what's listed on the form, that's a choice for
7 the patient to fill out. I don't know that that means that
8 anything was physically asked by the doctor of the patient.

9 Q. Okay. But these things have been asked to determine
10 prior treatments; correct?

11 A. These things are listed on a form for a patient to fill
12 out.

13 Q. Okay.

14 A. That's all I can see.

15 Q. But that would be something that would be beneficial to a
16 doctor to know prior, treatments that had either worked or not
17 worked; correct?

18 A. Certainly.

19 Q. Now, isn't the key to try to get someone to where they
20 could get a greater degree of functionality to be able to live
21 every-day life?

22 A. That's one of the goals of chronic pain treatment is try
23 to improve functional capacity.

24 Q. And to be able to lift things and get a better quality of
25 life?

1 A. Yes, a better quality of life and improve functionality,
2 as measured by a functional improvement.

3 Q. Okay. Doctor, how many patients do you see in a day?

4 A. Between myself and my extended staff, my physician's
5 assistant, we see somewhere between I'd say 40 to 60 patients
6 a day.

7 Q. Okay. Now, how much time do you spend on average with
8 each patient?

9 A. I'm not sure if I have a figure that's based on any fact.
10 I spend the appropriate time I need to with each of my
11 patients.

12 Q. Would it be fair to say after you've seen a patient for a
13 period of time you might spend less time with them?

14 A. In some cases, that would be the case, yes.

15 Q. So you kind of know the patient, you kind of know what
16 their history is; correct?

17 A. Yes. It can be some visits are routine in nature.

18 Q. And you're able to observe them, the way they're moving,
19 the way they're functioning, whether things are working;
20 correct?

21 A. Yes, I pay attention to that.

22 Q. Okay. So, with respect to this, doctor, isn't it true
23 that a key thing is to be able to see and actually see what
24 the patient looks like when they come into the room?

25 A. Yes. It's important to have a face-to-face encounter

1 with your patient when you're treating them.

2 Q. And it's much more beneficial than to observe something
3 simply through a chart; correct?

4 A. I'm sorry, I don't understand that question.

5 Q. It's more beneficial to be able to see a patient in
6 person than to judge by a piece of paper, would you agree with
7 that?

8 A. Yes. You have additional benefit when you're sitting in
9 front of a patient rather than just reviewing a medical
10 record, certainly.

11 Q. Okay. And did you ever speak with any of Dr. Smithers's
12 patients?

13 A. No, sir, I have not.

14 Q. Now, Dr. Smithers took methods to try to correct certain
15 things that were wrong that may have been not going as well in
16 his practice --

17 MR. RAMSEYER: Objection.

18 MR. WILLIAMS: I'll rephrase.

19 BY MR. WILLIAMS:

20 Q. Dr. Smithers instituted pill counts, did he not?

21 A. He had some pill counts on some of the charts that he
22 asked for.

23 Q. And he did drug screening.

24 A. He did have urine drug testing on many of the charts.

25 Q. Okay. And both of those are able to be manipulated by

1 patients, aren't they?

2 A. Yes. Neither is 100 percent foolproof.

3 Q. So a lot of times as a doctor you have to be able to
4 judge something to be able to give it the benefit of the doubt
5 or not; correct?

6 A. I think as a doctor you have the responsibility to judge
7 the entire situation and not just a single item of information
8 that's in front of you. It needs to be interpreted in the
9 context of the entire medical relationship with the patient.

10 Q. Okay. Now, doctor, just because something is not charted
11 doesn't mean it didn't actually happen; correct?

12 A. No. But in all practical matters, if it wasn't charted,
13 then I often teach medical students and a physician that is
14 younger than me that if it's not written down, then it
15 practically didn't happen.

16 Q. Okay. Now, doctor, every person in their charts
17 indicated that medication had helped them; correct?

18 A. To different degrees, yes. Some were complaining that it
19 wasn't helping enough. But, yes, that's a generally accurate
20 statement.

21 Q. Okay. Now, isn't it true that there are different
22 schools of thought over discharging patients?

23 A. I'm afraid you have to be more specific.

24 Q. As far as drug testing and stuff. Failing a drug screen.

25 A. You'll have to -- I'm sorry, I don't follow your

1 question.

2 Q. I'll rephrase it. That's probably a very poor question
3 on my part.

4 A. That's okay.

5 Q. Isn't it true that there are certain doctors and certain
6 schools of thought that believe you should never discharge a
7 patient, even if they failed a drug screen?

8 A. So I would say that many physicians would say that a
9 single point of information, certainly if it's contrary to
10 everything else that you know about the patient and then
11 collected, shouldn't serve as the only reason to discontinue a
12 relationship with a patient. There's many doctors who feel
13 that way. I would say that the assessment and judgment really
14 needs to be on a case-by-case basis and after a consideration
15 of all of the information rather than just a single data
16 point.

17 Q. Okay. But Dr. Smithers actually dismissed patients, did
18 he not?

19 A. Yes, he did.

20 Q. Now, Dr. Smithers also -- there were records in there
21 indicating he had checked the PMP, which is the prescription
22 being filled by other places; is that correct?

23 A. Yes, that's correct.

24 Q. He also checked criminal history, did he not?

25 A. I'm sorry? Criminal histories --

1 Q. Criminal histories.

2 A. Yes. Yes.

3 Q. All right. I want to pull up here DJ-150.

4 I want to ask you if you'll take a look at this
5 document here.

6 A. Yes, sir.

7 Q. Okay. What is this document showing?

8 A. This is titled Smithers Community Healthcare New Patient
9 Intake Form for Pain Management.

10 Q. Okay. Now, what is the patient's name there, if you can?

11 A. Name is Deanna Jessie.

12 Q. Okay. And the date on that form?

13 A. The date the form was filled out, September 24th, 2015.

14 Q. Okay. Now, one of the things you indicated earlier was
15 you pointed out -- Mr. Ramseyer pointed out a Post-it note, do
16 you recall, on Ms. Jessie's form?

17 A. I don't recall that one. We looked at quite a few
18 Post-it notes on these charts, yeah.

19 Q. Post-it note that may have said kidney stone information.

20 A. Yes, I recall that.

21 Q. Okay. Now, it says "chief complaint". What are the
22 chief complaints?

23 A. Lower back, kidney stones.

24 Q. Okay. Now with respect to this, I'm going to scroll down
25 just a little bit. When did this pain begin? What does that

1 state?

2 A. It was three years ago.

3 Q. Okay. And what caused her recurrent pain episode?

4 A. Upon falling in Walmart, car accident.

5 Q. So when you testimony -- the testimony was earlier about
6 the kidney stones. There's obviously more going on with
7 Ms. Jessie's situation than just kidney stones; correct? By
8 this form?

9 A. I don't know what's going on with this patient. All I
10 see is that they say they fell in Walmart three years ago and
11 had a car accident.

12 Q. Okay.

13 A. That tells me very little to nothing about what's going
14 on today.

15 Q. Doctor, when a person walks in with subjective intent to
16 deceive a doctor, would it have a negative impact on the
17 doctor's ability to treat that patient?

18 A. Yes.

19 Q. And some patients come in certainly with that idea in
20 mind; correct?

21 A. Yes.

22 Q. Okay. And it's almost impossible at times to be able to
23 tell certain times whether these are -- whether they're faking
24 or not, is it not?

25 A. No.

1 Q. Now, Dr. Bassam, how much are you being paid to be here
2 today?

3 A. My hourly rate for giving testimony is \$750 an hour.

4 Q. Okay. And was that the same rate that you were asked to
5 review the files?

6 A. Yes, that's correct.

7 Q. Okay. And how many times have you testified in criminal
8 cases?

9 A. This is my first time testifying in a criminal case.

10 Q. Okay. So you've never testified in a criminal case
11 prior?

12 A. No, sir. I don't do this professionally.

13 Q. Okay.

14 MR. WILLIAMS: Your Honor, may have a moment with my
15 client?

16 No further questions, Your Honor.

17 THE COURT: All right. Any further redirect?

18 MR. RAMSEYER: No, Your Honor.

19 THE COURT: All right. May this witness be excused?

20 MR. RAMSEYER: Yes, Your Honor.

21 THE COURT: Thank you, doctor. You may be excused.

22 THE WITNESS: Thank you, sir.

23 MR. RAMSEYER: Your Honor, I'd just like to confirm
24 with the Court that all of our exhibits that have been marked
25 have been introduced into evidence.

1 THE COURT: Madam Clerk; is that correct?

2 THE CLERK: Yes.

3 MR. RAMSEYER: That being the case, Your Honor, the
4 Government rests at this time.

5 THE COURT: All right. The Government rests.

6 And, Mr. Williams, are you ready to proceed?

7 MR. WILLIAMS: Your Honor, we would ask for sidebar,
8 if we could, please.

9 THE COURT: Well, I'll remove the jury if you need
10 to talk with me.

11 MR. WILLIAMS: I would request that, Your Honor.

12 THE COURT: All right. Ladies and gentlemen, if you
13 would follow the bailiff to the jury room, please.

14 (Proceedings held in the absence of the jury.)

15 THE COURT: Yes, sir, Mr. Williams.

16 MR. WILLIAMS: Your Honor, at this time the defense
17 would move --

18 THE COURT: Come to the lectern, please.

19 MR. WILLIAMS: Oh, sorry.

20 Your Honor, at this time the defense would make a
21 motion for judgment of acquittal. Certainly with respect to
22 Count 1, which involves the possess with intent to distribute.
23 I think the Government's only evidence is that with respect to
24 distribution would be certainly just a few pills in a baggie.
25 We certainly don't think that the Government has met its

1 burden with respect to that.

2 In addition, certainly the Government did not
3 produce several witnesses on the stand. And also we believe
4 that -- did not produce several witnesses on the stand with
5 respect to counts -- to Counts 3 through 862, I think, and
6 certainly for those grounds, we'd move for a motion of
7 judgment of acquittal on those grounds as well.

8 THE COURT: All right. Mr. Ramseyer.

9 First, let me ask you about Count 1. What is the
10 basis for the Government's proof?

11 MR. RAMSEYER: Your Honor, it's the way that they
12 were packaged. They were in individual packets of ten in the
13 baggies, that's part of it. And also the quantity was
14 hundreds of pills of controlled substances.

15 THE COURT: Well, the defendant is a -- or was at
16 the time a physician. So why -- why would not the Government
17 have to prove that his possession with intent to distribute
18 was beyond the bounds of medical practice and not for a
19 legitimate purpose?

20 MR. RAMSEYER: He's not allowed to possess
21 controlled substances, Your Honor. He can't take controlled
22 substances back from a patient, and he can't -- I don't
23 believe he had a license to dispense Schedule II controlled
24 substances.

25 THE COURT: Well, I mean, where is this --

1 MR. RAMSEYER: That's in the federal regulations,
2 the DEA regulations, Your Honor.

3 We can move to introduce those into evidence. We
4 were --

5 THE COURT: I'm sorry?

6 MR. RAMSEYER: We can move to introduce those into
7 evidence. We were asked -- we were considering asking the
8 Court to include that as a jury instruction. It's the law.
9 It's not a --

10 THE COURT: The law is that a physician cannot,
11 what? Possess a controlled substance?

12 MR. RAMSEYER: Cannot -- they have to have a special
13 license to dispense Schedule II controlled substances. And
14 after that a special license to take pills back from a
15 patient.

16 THE COURT: Well, how do we know that these pills
17 were taken back from a patient?

18 MR. RAMSEYER: We don't. But, I mean, those are the
19 two options, either --

20 THE COURT: Well, I mean, you know, I don't know
21 what the regulations say. But physicians, I understand, at
22 least in my experience, have in their office on occasion
23 medication that they give to patients. Correct?

24 MR. RAMSEYER: They do. Not Schedule II controlled
25 substances, Your Honor.

1 THE COURT: And where is that in the United States
2 Code? Where is that in -- you know, it's -- the indictment
3 charges -- if this was in violation of 21, 841(a) and (b).

4 MR. RAMSEYER: Your Honor, the agent's corrected me.
5 He can dispense controlled substances. He can't -- he has to
6 be licensed to take drugs back.

7 And to answer your question specifically, these
8 weren't packaged, like, in a bottle of oxycodone pills, or a
9 bottle of oxymorphone pills. These were all passed together
10 into a nutrition supplement bottle.

11 THE COURT: Well, I understand that. But how would
12 the jury -- are you saying that the jury -- because they
13 weren't packaged in a bottle with the name of the controlled
14 substance on it that he couldn't dispense it?

15 I mean, where is the evidence that it was a
16 violation of federal law for the defendant to have in his
17 possession, as a physician, a controlled substance? Just,
18 those are the facts. He had in his possession, at least I
19 believe the jury could find, he had in his possession
20 controlled substances. He is a physician. Why doesn't the
21 same standard apply to his possession of that controlled
22 substance with intent to distribute, as it does writing a
23 prescription?

24 MR. RAMSEYER: Well, if it does, Your Honor, again,
25 the way it was packaged, we think would be evidence that it

1 wasn't for a legitimate medical purpose within the scope of
2 practice. Just, that's not the way, I mean, I think -- I
3 don't know that you have to have an expert testimony about a
4 bottle full of all different kinds of pills is a doctor being
5 a legitimate doctor.

6 THE COURT: Well, but what's the -- I mean, what's
7 the Government's inference here? that he was selling these
8 drugs on the street?

9 MR. RAMSEYER: Well, the inference was that they
10 were with the intent to distribute. He's got a bottle full of
11 pills.

12 THE COURT: Right.

13 MR. RAMSEYER: Schedule II drugs and other drugs.

14 THE COURT: And non-controlled substances.

15 MR. RAMSEYER: And non-controlled substances.

16 THE COURT: Right.

17 MR. RAMSEYER: Again, under DEA regulations, he has
18 to have a license to be able to take drugs back from a
19 patient.

20 THE COURT: No evidence that those pills came back
21 from any patient.

22 MR. RAMSEYER: Right. So if you go with that
23 evidence, that means he got them from a manufacturer, took
24 them out --

25 THE COURT: He got them from a pharmacy. He wrote a

1 prescription.

2 MR. RAMSEYER: He can't do that either. He can't
3 write a prescription to just have the pills come back to him.

4 But, in any event --

5 THE COURT: No, no, no. He in some way lawfully
6 obtained, just like physicians do, obtained medicine,
7 prescription medicine that he had in his office or possession.

8 MR. RAMSEYER: Again, to do that, he can't just
9 write a prescription to the pharmacy, like, in his name to
10 have pills come back to him. So he can't do that. He's got
11 to order them from a manufacturer. I think there's some
12 mechanism to get it from a pharmacy, but it would have to be
13 done in the right manner.

14 THE COURT: So where's the evidence that he didn't
15 do that?

16 MR. RAMSEYER: Well, again, the Government's not
17 really -- the point of the Government's case is not how he got
18 the drugs.

19 THE COURT: Right.

20 MR. RAMSEYER: It's how the drugs are being
21 packaged. They're in a backpack in his car in a nutritional
22 supplement bottle. It's not -- I mean, you can't even -- you
23 know, they're, like -- there's an oxycodone pill, there's an
24 OxyContin pill, there's an MS Contin --

25 THE COURT: Well, I agree that it's very, very

1 strange. But, so would you agree with me that the Government
2 has to prove that his intent to distribute under Count 1 was
3 beyond the bounds of medical practice and not for legitimate
4 purpose?

5 MR. RAMSEYER: May I have a moment, Your Honor? I
6 believe so, but I want to just check.

7 THE COURT: Well, I've been concerned about this. I
8 did not provide counsel with a proposed instruction as to
9 Count 1, because I, frankly, didn't understand what the
10 Government's theory was. I didn't know if some evidence was
11 going to be presented. Now it is possible -- I mean, there
12 are cases that say that you don't have to have an expert. The
13 Government does not have to have an expert in a case such as
14 this when the facts are extreme enough that a reasonable jury
15 could find that it was beyond the bounds of medical practice
16 and not for legitimate purpose. I don't know that they're
17 there in this case, but that's a possibility.

18 MR. RAMSEYER: I think we would agree with the Court
19 that it would have to be possession with the intent to
20 distribute outside the scope of professional practice or
21 without a legitimate medical purpose. We tried a case here
22 without an expert for a medical practitioner.

23 THE COURT: Right.

24 MR. RAMSEYER: So we don't think there needs to be
25 expert testimony on that.

1 THE COURT: I agree.

2 MR. RAMSEYER: And we think the facts in this case,
3 with all the other facts in the case about the way
4 Dr. Smithers was operating, and the way these things were
5 bottled, you know, they're in the backpack, there's like
6 \$20,000 of cash in the glove compartment, we think there is
7 evidence of possession with intent to distribute. What other
8 reason is there for him to possess pills in that form?

9 THE COURT: Well, I mean, they may have been just
10 for the same reason he was writing the prescriptions for his
11 patients. Maybe he carried them around in case he ran into a
12 patient who needed them and he dispensed them on the spot.

13 MR. RAMSEYER: Again, Your Honor, that would be, we
14 believe, outside the scope of professional practice given the
15 testimony that's been given about what's within the scope of
16 professional practice.

17 THE COURT: All right. All right.

18 MR. RAMSEYER: Thank you, Your Honor.

19 THE COURT: Mr. Williams, anything further you want
20 to say on that?

21 MR. WILLIAMS: Your Honor, I think that one of the
22 key points, and I think the Government and I may even be
23 agreeing on some of the facts on this, but I think we view it
24 differently. I think the key part of this thing is that
25 typically when we see something where there's intent to

1 distribute we have packaging. We've got them set aside.
2 We've got a certain kind of thing here and there. These are
3 all placed in bottles mixed up along with vitamins, herbal
4 supplements, along with all kinds of other things. And I
5 think certainly that goes to the fact that this clearly isn't
6 a distribution ring. If you're going to be distributing
7 pills -- at least if I would be -- I would want them in an
8 order or something, this is what I'm handing out or whatever.
9 I don't want to have to go digging through a bottle amongst a
10 bunch of vitamins and everything else to distribute anything.
11 So we certainly think the Government has failed to prove that
12 element.

13 THE COURT: All right. Thank you.

14 Well, I have some question about the sufficiency of
15 the proof as to Count 1, but I'm going to take the motion for
16 judgment of acquittal as to Count 1 under advisement. And
17 under the rules, I will make that determination in the event
18 that the defendant is convicted by the jury of that count
19 based on the evidence presented in the Government's case in
20 chief.

21 Otherwise, I will deny the motion for judgment of
22 acquittal. I find that there has been sufficient evidence
23 presented as to the other counts of the indictment.

24 Let me ask Mr. Ramseyer that. Did the -- as to the
25 other counts, except the one that the Government has

1 dismissed, do you represent that the Government has presented
2 evidence in its filings as to each of those?

3 MR. RAMSEYER: Yes, Your Honor. We presented the
4 patient files. We've presented the prescriptions. And we've
5 presented the chart of the expert and his testimony that all
6 of those were outside the scope of professional practice. We
7 think all of the evidence in the case goes toward the
8 maintaining a place count, which is Count 2.

9 THE COURT: Yes, sir. Well, I will deny the
10 judgment for -- motion for judgment of acquittal as to the
11 other counts.

12 All right. Mr. Williams.

13 MR. WILLIAMS: Your Honor, one other matter, just
14 sort of a, I guess, a housekeeping matter. Defense has two
15 witnesses here today. Dr. Smithers had actually talked to
16 another lady about testifying -- I think, actually supposed to
17 have her here tomorrow, a lady by the name of Deborah Moore.
18 We have not been able to get ahold of her as far as her
19 attendance. I know he has tried, and I've tried throughout
20 the weekend, and even tried as far as as close as during
21 lunch. So we're not sure of the status of her. I've left
22 messages, even sent a text message. But that is a witness
23 that we are not sure of, at least at this point, whether or
24 not she will be here today or be able to testify.

25 THE COURT: Well, let's see if we can get ahold of

1 her today, and we'll see where we are about that after you've
2 presented your other witnesses.

3 MR. RAMSEYER: Your Honor, Dr. Smithers is not
4 supposed to be in contact with any witnesses in the case as
5 part of his condition of release.

6 THE COURT: Well, I don't know what this witness is,
7 but I'll take that up if the witness doesn't show up.

8 MR. WILLIAMS: Judge, I would just simply say it's
9 not a Government witness. It's not a witness that's been, to
10 my knowledge, interviewed by the Government in any way.

11 THE COURT: Yes, sir. I'm not going to take that
12 issue up right now. It may be --

13 Now, has the defendant decided whether or not he's
14 going to testify or not, Mr. Williams?

15 MR. WILLIAMS: Your Honor, I'm not sure. He and I
16 have been in discussions, and I think he's gone back and forth
17 as to whether he's going to or not.

18 THE COURT: All right. In any event, you're going
19 to call these other witnesses now?

20 MR. WILLIAMS: Yeah. It would be preferable to call
21 them first.

22 THE COURT: Yes, sir. Absolutely.

23 So then you're ready to proceed on that?

24 MR. WILLIAMS: We are.

25 MR. RAMSEYER: Your Honor --

1 THE COURT: Yes, sir.

2 MR. RAMSEYER: -- one matter. One of the witnesses
3 Mr. Williams indicated they intended to call, Lennie
4 Hartshorn, who is the father of Heather Hartshorn, we believe
5 that the testimony that they are seeking to illicit from him
6 would be hearsay. We don't believe there's any admissible
7 evidence that he could present.

8 THE COURT: Yes, sir, Mr. Williams.

9 MR. WILLIAMS: I think certainly -- I mean, I would
10 certainly caution Mr. Hartshorn about hearsay evidence. But
11 certainly we would ask that he be allowed to testify to what
12 he has personal knowledge of.

13 THE COURT: Well, again, obviously hearsay --

14 MR. WILLIAMS: I understand.

15 THE COURT: -- unless there's some exception, for it
16 will not be admissible.

17 MR. WILLIAMS: I understand.

18 THE COURT: All right. We'll have the jury back in,
19 please.

20 (Proceedings held in the presence of the jury.)

21 THE COURT: All right. Ladies and gentlemen, you've
22 heard the Government's evidence in chief. And the defendant
23 will now be given an opportunity to present evidence.

24 Mr. Williams, you may proceed.

25 MR. WILLIAMS: Your Honor, the defense calls Brenda

1 Fisher.

2 THE COURT: All right. Is that witness outside?

3 MR. WILLIAMS: She is.

4 THE COURT: If you would get her.

5 MR. WILLIAMS: Your Honor, Ms. Fisher is I think in
6 a wheelchair. Not sure if she'll be able to get up there or
7 not.

8 THE COURT: All right. Perhaps we could put her
9 down right in front next to the lectern. Her testimony ought
10 to be picked up by the microphone at the lectern.

11 Well, there is a microphone right behind the lectern
12 there.

13 If the witness will come around. There you go.

14 Raise your right hand to be sworn, please.

15 THE CLERK: Do you solemnly swear that the testimony
16 you're about to give in this case shall be the truth, the
17 whole truth, and nothing but the truth, so help you God?

18 THE WITNESS: I do.

19 THE COURT: Ma'am, if you'll speak up so that we can
20 all hear you.

21 THE WITNESS: Okay.

22 **BRENDA M. FISHER,**

23 Called as a witness herein by the Defense, having been first
24 duly sworn, was examined and testified as follows:

25 ///

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Would you please state your name for the jury.

A. Brenda M. Fisher.

Q. Spell your last name so they get it right.

A. F-i-s-h-e-r.

Q. Ms. Fisher, where do you live?

A. In Leon, West Virginia.

Q. And do you know Dr. Smithers?

A. Yes.

Q. Okay. And how do you know him?

A. I went to him as a patient.

Q. Okay. Do you remember when you first saw him?

A. No, I don't.

Q. Was it around November 17th of 2016; does that sound about correct?

A. Of 2,000 what?

Q. '16?

A. Yeah.

Q. Okay. And describe, if you will, that first visit with Dr. Smithers.

A. I went to him just like any doctor, and he tested my back. He examined my back and everything.

Q. Okay. When you say "examined," describe what all he did during that initial --

1 A. I don't remember exactly what he did, but I know he
2 checked my back and he had me walk for him in the room like
3 most back doctors do.

4 Q. Okay. Do you recall if he took any vital signs or
5 anything like that?

6 A. Yes.

7 Q. Okay.

8 A. I do believe so.

9 Q. All right. And how long was your first visit, do you
10 recall?

11 A. Quite a long time, because he takes you in there and
12 talks to you for -- it seemed like it was over two hours, the
13 best of I can remember.

14 Q. Okay. And what all were you-all talking about in that?

15 A. He actually went clear back into my childhood.

16 MR. LEE: Objection, Your Honor, as to hearsay. I
17 don't think the witness can testify about a conversation with
18 Dr. Smithers and be admissible.

19 THE COURT: I'm going to overrule the objection. It
20 seems to me that under the circumstances its the -- not for
21 the truth of the matter, but to show a pattern or routine.

22 BY MR. WILLIAMS:

23 Q. Okay. Go ahead.

24 A. Can I answer? I get confused.

25 Q. Yeah.

1 A. Yeah, he sat there and he talked to me. He went clear
2 back into my childhood. Like I said, you know, the first time
3 I injured my back, I was 18 working for 7-Eleven. I mean, he
4 went clear back --

5 Q. Okay.

6 A. -- to find out exactly how all the damage had been done
7 to my back.

8 Q. Okay. And describe to the jury what was wrong with your
9 back.

10 A. I've got degenerative bone disease and bulging disk. And
11 I've got a right knee that needs replaced. At that time I was
12 on cancer medicine, so they didn't want to replace my knee
13 joint until I got off the cancer medicine.

14 Q. Okay. Now was there something happened when you were
15 about 17 that contributed to this?

16 A. I was in a car accident.

17 Q. Okay. And describe the car accident, if you will.

18 A. Somebody backed out in front of my mother. She was
19 driving, and we went around the telephone pole. And I lost
20 the use of my legs. I couldn't even feel them. When they got
21 me out of the car to stand up, I had to look down to see if I
22 had legs.

23 Q. Okay.

24 A. I've had trouble with my back ever since.

25 Q. Okay. Now did Dr. Smithers prescribe anything?

1 A. Yes.

2 Q. What all did he prescribe?

3 A. Well, I had to take in my pharmacy list to show what I
4 had been taking. And I had been taking the Roxicodone 30s.

5 Q. Okay.

6 A. And he said he would start me -- I think he started me
7 off, I'm not sure, but he said that he would give me those for
8 a couple months, then he was going to start weaning me off
9 them because he didn't like prescribing those to anybody.

10 Q. Okay. And what did -- did he tell you what he was
11 planning on? Or did he prescribe anything else other than the
12 oxycodones?

13 A. Yes. He would prescribe me other medication to take the
14 breakthrough pain and to get me off the Roxicodone
15 30 milligrams. He said they were too strong and he didn't
16 like having those for any of the patients.

17 Q. Okay. Now what did he prescribe other than that?

18 A. Opanas.

19 Q. Okay.

20 A. And where they're time released, I've had a gastric
21 bypass and they gave me heartburn real bad. He asked me to
22 try them for a while, which I did, and I couldn't take 'em, so
23 I brought them back into the office.

24 Q. Okay.

25 A. And I think I had taken -- or oxymorphone, is that the --

1 I don't know if that's the same thing as the Opanas. He tried
2 a couple two, three medicines with me.

3 Q. Okay. And you said you weren't able to take it; is that
4 right?

5 A. I get heartburn real bad because it lays in your stomach
6 too long.

7 Q. What did you do with those?

8 A. I brang 'em back to him.

9 Q. When you brought 'em back to him, was there anything in
10 particular you did with them?

11 A. Well, the -- I don't know what Wendell was called, the
12 counselor or whatever. He would go into the restroom. He
13 would count them and write them on a paper that he had. Me
14 and him would go into the restroom where they did the drug
15 testing. We'd go into the restroom and he'd flush them and
16 then we'd both sign off on a paper that they had been flushed.

17 Q. Okay. Now, was there a time that Wendell was there that
18 was busy or had to hurry or something?

19 A. He had gotten a phone call right as I went into the
20 office, and he found out that his father was about to pass
21 away. He came in, said, I'm going to talk to you real quick
22 and do my job, but I'll just go ahead and give those to
23 Dr. Smithers and, you know, he can destroy them later.

24 Q. Okay. Now what are those?

25 A. I don't remember if it was the oxymorphone or the Opanas.

1 But one of them I had returned to him, the last time I
2 returned to him anything, they were in the little packets 10
3 at a time.

4 Q. Okay. Describe what you mean by "little packets"?

5 A. They're little Ziploc baggies. I would put my medication
6 in those and that way it would help me keep track of how many
7 I had to make sure I was, you know, not getting ahead of
8 myself on my medicine and I'd have enough to last me 'til my
9 next doctor's visit.

10 Q. Okay. Why would you put them in things of ten?

11 A. That's just the way I can count easier. I mean, at the
12 deposition they had asked me about that. They said why not 7
13 or 7 days' worth?

14 I said, I don't know. Just everybody counts
15 differently, and I count in the 10s.

16 Q. Okay. Now how many of them did you return?

17 A. Several. I don't remember the exact number.

18 Q. Okay. More than 20?

19 A. I think so. I think it was several.

20 Q. More than 30?

21 A. Yeah, I think so. It was a bunch of 'em because I
22 couldn't take them very well.

23 Q. Okay.

24 A. He told me to try to take them for so many days, and I
25 did, but they just hurt me real bad.

1 MR. WILLIAMS: May I have a moment, Your Honor?

2 No further questions at this time, Your Honor.

3 THE COURT: All right. Cross-examination.

4 **CROSS-EXAMINATION**

5 BY MR. LEE:

6 Q. Good afternoon.

7 A. Hello.

8 Q. Ms. Fisher, you thought Dr. Smithers was a good doctor,
9 didn't you?

10 A. Yes, I did.

11 Q. You thought, and I think you said, he checked you and
12 treated you like the other back doctors do; is that correct?

13 A. Yes.

14 Q. And you really liked Dr. Smithers, didn't you?

15 A. Well, he was always talking about taking me off of the
16 medication, you know, stepping me down and getting everybody
17 off the medication, the stronger stuff.

18 Q. He was?

19 A. Yes.

20 Q. Okay. Did he ever do that?

21 A. Yes, he was trying. Like I said, I had trouble with some
22 of the medication because of my gastric bypass. Where they're
23 extended release, they lay in your stomach and it comes off so
24 much at a time.

25 Q. Okay. You said he also testified he wanted you off the

1 oxycodone; right?

2 A. Right.

3 Q. He never took you off the oxycodone, did he?

4 A. I think he had taken me down to 20 milligrams, instead of
5 the 30 milligrams that I originally was on.

6 Q. Okay. But he was also prescribing you OxyContin at that
7 time, wasn't he?

8 A. He prescribed something for the breakthrough pain to get
9 me off the other stuff. Because I had trouble tolerating it,
10 and I live so far away, so he was trying to get me on
11 something else that I could tolerate.

12 Q. Let's talk about that. How far away did you live from
13 Dr. Smithers?

14 A. Quite a ways. I lived in -- I live in Leon.

15 Q. How many hours did it take you to drive to Martinsville,
16 Virginia?

17 A. About four, I think.

18 MR. LEE: Ms. Vogt, could you bring up Government's
19 Exhibit 50, please.

20 Let me see if -- can I swing -- I'll try to show you
21 this.

22 Actually -- I tell you what, don't worry about it.

23 BY MR. LEE:

24 Q. I don't know if you can see that, ma'am.

25 A. Yeah, a little bit.

1 Q. Where is Leon, do you know?

2 A. Near Buffalo.

3 Q. Okay.

4 A. Near Toyota.

5 Q. So I've circled Buffalo up there, is that --

6 A. Yeah, that's about right.

7 Q. Okay. So you live there. Of course, Martinsville, if
8 you're familiar with the map, it's all the way down there;
9 right?

10 A. Right.

11 Q. Where did you fill your prescriptions?

12 A. At Ravenswood. Well, at the time I was staying with a
13 gentleman at his house most of the time helping him to the
14 doctor appointments and stuff, Larry Workman, and he lived in
15 Millwood, which is right there in that circle --

16 Q. Okay.

17 A. -- and we got our medications filled at Ravenswood --

18 Q. Is that in that area, too?

19 A. Yes. Ravenswood Drug I think is the name of it.

20 Q. So you drove at least four hours?

21 A. Yes.

22 Q. Is that each way to Dr. Smithers's clinic?

23 A. Yes.

24 Q. Okay. And I think you also testified at a prior time
25 that you used to stay overnight before your visits; is that

1 correct?

2 A. Yeah. It would be easier on Larry, yeah.

3 Q. And you've been to a lot of doctors, haven't you?

4 A. Oh, yeah. Different problems.

5 Q. Okay. And you've been to pain clinics in the past;
6 correct?

7 A. No. I don't know. I went to one in Cleveland, and I'm
8 not sure if it was before Dr. Smithers or after Dr. Smithers.

9 Q. Let's talk about doctors that have written you controlled
10 substances such as oxycodone, ketamine, and similar controlled
11 substances.

12 A. What's ketamine?

13 Q. Ketamine, it's a pain prescription.

14 A. I don't believe I've ever been on that.

15 Q. Okay. Do you know a Dr. Derakhshan?

16 A. Yes.

17 Q. Okay. He was your doctor for a long time, wasn't he?

18 A. Yeah. I started going to him in 1997 for migraines.

19 Q. Is he still practicing as a doctor?

20 A. No, not to my knowledge.

21 Q. He got shut down, didn't he?

22 A. Yeah.

23 Q. He got prosecuted by the United States Attorneys Office
24 in West Virginia, didn't he?

25 A. I don't know.

1 Q. He got prosecuted for illegally prescribing and failing
2 to record the dispensing of controlled substances, didn't he?

3 A. I don't know.

4 Q. Okay. You just know he can't write you controlled
5 substances.

6 A. I just know he closed.

7 Q. Do you know a Dr. Holly?

8 A. Yes.

9 Q. Okay. Is he still writing you prescriptions?

10 A. Not to my knowledge.

11 Q. Did he get shut down too?

12 A. No. I believe he's still open. He's a heart doctor and
13 different things.

14 Q. Okay. But he can't write controlled substances, can he?

15 A. I don't believe so.

16 Q. That's why you stopped going to see him, wasn't it?

17 A. Well, I went there with my daughter and she stopped going
18 down there. I went down to Dr. Kessinger in Eleanor, in
19 Putnam County.

20 Q. Do you remember testifying in front of the grand jury?

21 A. I don't remember if it was a deposition or what it was,
22 but yeah.

23 Q. In this courthouse?

24 A. Yeah.

25 Q. Back in September of 2017?

1 A. Yeah.

2 Q. Okay. Do you remember testifying you saw Dr. Holly in
3 Point Pleasant, and he would give me Percocets until he
4 couldn't write?

5 A. Yeah. If that's what I said, I don't remember.

6 Q. So you went to him after your other doctor got shut down;
7 right?

8 A. Yes.

9 Q. You went to Dr. Holly until he got shut down as far as
10 writing controlled substances.

11 A. Right. Everybody in the state of West Virginia, you
12 know, they couldn't write medications.

13 Q. And then you went to Dr. Smithers?

14 A. Yes.

15 Q. And you drove four hours each way to see him?

16 A. Well, with the guy that I was staying with, me and my
17 husband would take him to his doctor's appointments and
18 everything until he died. And he started going there, and
19 then I started going after I started taking him down there
20 several times.

21 Q. You're talking about Larry Workman; correct?

22 A. Yes.

23 Q. Okay. He was a drug dealer, wasn't he?

24 A. I'm not sure what he did.

25 Q. Well, he got charged with dealing drugs, distributing

1 drugs, didn't he?

2 A. He was already dead when they did that.

3 Q. Okay. But he got charged with it; correct?

4 A. That's what they said. They had a warrant for him. I
5 don't know what they charged him with.

6 Q. You got charged in addition to that with him, didn't you?

7 A. Yeah, because I was in the same place when he was doing
8 it.

9 Q. So he was a drug dealer; correct?

10 A. I mean, I know he would do things with the -- you know,
11 the kids would come in and he would loan them money and stuff.
12 But I didn't really realize he was selling drugs because I
13 stayed in my room most of the time.

14 Q. Okay. And that's the person that took you and referred
15 you to Dr. Smithers; correct?

16 A. Yes.

17 Q. Okay. And Mr. Workman had been a patient of a place
18 called Hope Clinic before that, hadn't he?

19 A. Yes.

20 Q. And they got shut down?

21 A. In Beckley, and then he went to Wytheville.

22 Q. Okay. And then that place got shut down; correct?

23 A. Yeah.

24 Q. And then the two of you went to Dr. Smithers?

25 A. He went to Dr. Smithers two or three times and then I

1 went to him. He went several -- I don't know exactly how many
2 times he went before I started with him.

3 Q. Now, when you were seeing Dr. Smithers, you were not in a
4 wheelchair as you are today; correct?

5 A. Right. I had surgery -- I've had three surgeries in the
6 last couple years -- two years on my -- on a hernia. I still
7 have a hole in my belly with a patch on it.

8 Q. Okay. So you --

9 A. And I got tendonitis in that hip from that.

10 Q. Okay. So you're in a much different condition than you
11 are now -- or than you were when you saw Dr. Smithers?

12 A. Right. I was walking with a cane.

13 Q. Okay. Now you paid \$450 for your first visit at
14 Dr. Smithers's office; correct?

15 A. Yes.

16 Q. That was in cash; right?

17 A. Yes.

18 Q. He didn't take your insurance?

19 A. No.

20 Q. Why not?

21 A. He couldn't bill the insurance. I don't know why. The
22 insurance is -- my insurance is military.

23 Q. Okay. And then you also stated that every time -- well,
24 I don't want to -- did every time you went to see him, did you
25 stay overnight in a hotel?

1 A. Yes. Because sometimes when you'd go in there, he'd be
2 so busy, you'd have to wait several hours to be seen.

3 Q. Okay. So in addition to what you were paying cash for
4 your office visit, you were having to pay for a hotel room?

5 A. Well, Larry paid for half, and I paid half the expenses.

6 Q. So you're paying some amount of money; right?

7 A. Right.

8 Q. And you're on a fixed income; correct?

9 A. Yes.

10 Q. What was your monthly income, if you know?

11 A. I don't have any income. My husband has a military
12 retirement. I've got an auction house, but I haven't been
13 selling much. I mean, I did. But the last couple years with
14 my stomach, I haven't been able to sell anything.

15 Q. Okay. So what's your husband's monthly income?

16 A. About 1400 on retirement and about 13 on social security,
17 I think. Something like that.

18 Q. Is that what it was back when you were seeing
19 Dr. Smithers?

20 A. Yes.

21 Q. Okay. So you paid \$450 for your first visit, for that
22 first visit. Then after that it was \$300 cash a month;
23 correct?

24 A. Something like that. I'm not sure.

25 Q. Every time you went to see Dr. Smithers.

1 A. When I had this surgery -- I had one in September and
2 then one in December of 2018. And in September my -- no, end
3 of December. My heart started messing up and they gave me a
4 lot of heart medication, so I don't have a really good memory
5 on everything. Used to be I could quote numbers and
6 everything, but I just can't do that anymore.

7 Q. You didn't have any trouble remembering when asked
8 questions by Mr. Williams, did you?

9 A. Certain things I said best I could remember.

10 Q. Okay. But you can't tell this jury how much you had to
11 pay for an office visit?

12 A. It was around 300, I think, like you said. It sounds
13 familiar.

14 Q. Then you had to pay about \$300 to get your prescriptions;
15 correct?

16 A. No, my insurance paid for those.

17 Q. Every time?

18 A. Well, I think the first time we had went to a drugstore
19 in -- I'm not sure where that was.

20 Q. Was it in Wytheville?

21 A. I think so. Mike's.

22 Q. Best Practices?

23 A. Yeah.

24 Q. You actually went there and filled your prescriptions on
25 two, at least two occasions, didn't you?

1 A. I'm pretty sure it was just one because I had to pay cash
2 there, unless he started taking my insurance. And then I got
3 the pharmacy at the house to take it -- my insurance. So it
4 didn't cost me anything, or just very little, I don't
5 remember.

6 Q. Okay. But when you went to Mike's it was about \$300,
7 wasn't it?

8 A. Yeah. Like I said, I think I just found pills there
9 once.

10 Q. Okay. So you're looking somewhere 600 to \$700 just to go
11 to the doctor that you're paying out cash?

12 A. The one time.

13 Q. Do you remember testifying in the grand jury that you
14 went to Mike's at least twice to fill your prescriptions
15 there?

16 A. No, I don't remember. I thought it was just one time.

17 Q. Well, that's the only place you could get Opana filled;
18 right?

19 A. I did there in Ravenswood, Ravenswood Drugs, eventually.
20 But I talked to the owner of it and got him to -- because he
21 knew how bad I was hurting and everything, my condition, so he
22 filled them for me.

23 Q. Now you talked about this -- well, let me ask you this.
24 Did you actually see Dr. Smithers every time you went for a
25 visit?

1 A. There was once for -- I think it was just one time. I
2 don't remember exactly. But he would talk to me on a
3 face-to-face, whatever you call that, on the phone.

4 Q. FaceTime?

5 A. Yeah. Something like that.

6 Q. Are you sure it didn't happen at least twice?

7 A. It may have, I don't recall.

8 Q. Okay. So you go in, you'd see Wendell --

9 A. Yeah.

10 Q. -- wait numerous hours, then you'd walk in and the doctor
11 wouldn't even be there?

12 A. No. When you went in and talked to Wendell, then he
13 would tell you whether Dr. Smithers was there or not.

14 Q. Okay. And how often did that happen?

15 A. Like I said, I remember one time. But I don't recall --
16 I don't remember.

17 Q. But, again, you remember testifying in the grand jury
18 that it could have been more than once?

19 A. I don't remember what I even said. I know I was here.
20 But, like I said, those three heart medications they put me
21 on, I'm sorry, but I don't recall everything.

22 Q. Did you have to pay when you just talked to the doctor on
23 the phone?

24 A. Yes.

25 Q. What were you paying for?

1 A. What do you mean?

2 Q. Well, you didn't have a medical exam, did you?

3 A. Yeah. Wendell would take care of everything like
4 Dr. Smithers did.

5 Q. What do you mean?

6 A. Like your -- your heart rate and that stuff.

7 Q. So Wendell would take your heart rate?

8 A. Yeah.

9 Q. Take your blood pressure?

10 A. Then you have your drug test and all that, you know.
11 Whether Dr. Smithers was there or not, you know.

12 Q. Okay. And did Wendell do a back exam for you?

13 A. No. I don't recall.

14 Q. Okay. Did he do anything other than just check your
15 heart rate and do a urine screen?

16 A. I don't remember what all he did, actually. I know I'd
17 go in and talk to Wendell.

18 Q. Okay. So on these occasions when a doctor wasn't even
19 there, Wendell would do some kind of medical stuff, you can't
20 remember what, and then a urine screen, and then you'd get on
21 the phone with the doctor?

22 A. Right. Well, Wendell didn't actually do the urine
23 screens. After a while they had another person qualified to
24 do it, that way it got you in and out faster.

25 Q. All right. So then you talked to the doctor. Did -- who

1 gave you a prescription?

2 A. I don't know if the guy up front gave it to -- I think
3 the guy up front would give it to you after they got written
4 and they got copies.

5 Q. Who wrote the prescription?

6 A. I don't know. I didn't never see that.

7 Q. Okay. Clearly it wasn't Dr. Smithers; right?

8 A. Unless he came in. Sometimes he would come in and then
9 leave.

10 Q. But you'd still have to talk to him on the phone? I'm
11 just talking about the times that you never saw Dr. Smithers
12 in person.

13 A. Right. I don't know what happened with the
14 prescriptions.

15 Q. Just some guy at the front would give them to you after
16 you paid your \$300?

17 A. After I'd seen Wendell and talked to Dr. Smithers.

18 Q. Okay. Now you mentioned these drugs that you
19 supposedly -- or that you testified that you brought back to
20 Dr. Smithers; is that right?

21 In fact, Dr. Smithers told you about this idea that
22 you brought these drugs back to give to him, didn't he?

23 A. Yeah, he told me to bring them back if I couldn't take
24 them.

25 Q. No. No. He told you that at some point you'd be

1 questioned by the DEA about bringing drugs back to him, didn't
2 he?

3 A. No.

4 Q. He didn't have a conversation with you --

5 A. Oh, well, he did about the -- once it was in the bag. I
6 went to see him, I think it was -- may have been the last
7 visit, and he said, "You're the baggie woman."

8 And I said, "What?"

9 He said, "You're the one that returned the medicine
10 in the bag the day that Wendell's dad was dying."

11 Q. So he told you about this incident that had occurred,
12 didn't he?

13 A. Yeah. I think he talked to a DEA agent while I was
14 there.

15 Q. And this was right after a search warrant had been
16 executed at Dr. Smithers's practice, wasn't it?

17 A. I'm not sure about that because I wasn't there.

18 Q. Okay. And it's your testimony that you had been getting
19 this oxymorphone, that you didn't like it, and that you
20 brought it back and give it to Dr. Smithers.

21 A. Yeah, I don't know if it was the Opana or the
22 oxymorphone. I forgot about even getting that.

23 Q. Well, you got three different prescriptions for that
24 drug, didn't you?

25 A. I don't know. Now I know one of the medications he gave

1 me and he said that I didn't try it long enough. And he asked
2 me to try it a little longer.

3 Q. Okay. You got a prescription for oxymorphone or Opana on
4 November 17th, December 15th, both in 2016, and January 12,
5 2017; does that sound about right?

6 A. I have no idea. I don't remember this.

7 Q. And then you talk about on one occasion you brought back
8 pills that you couldn't take. But the doctor told you he
9 wanted --

10 A. It happened more than once. It happened more than once.
11 I remember two times. And it may have been a third
12 time. I don't remember.

13 Q. Okay. But on at least one occasion, you actually brought
14 pills back to Dr. Smithers and then he wrote you another
15 prescription, didn't he?

16 A. Of something else, yes.

17 Q. Well, he wrote you a prescription for the same thing
18 because you hadn't tried it long enough.

19 A. That's what I just said, yes.

20 Q. Okay. So explain to me why if you already have pills in
21 your possession that you haven't taken from a prior
22 prescription, why did the doctor need to write you another
23 prescription for that same set of pills?

24 A. Well, like I said, you'd go in and see Wendell first.
25 And Wendell flushed them down the toilet and took care of

1 them. You know, and then I would see Dr. Smithers and then he
2 would tell me I needed to try it longer. Because he was
3 really trying to get me off all the harder medications.

4 Q. Okay.

5 A. And he was right. I mean, at the time I didn't think he
6 was right, you know, because I thought Dr. Derakhshan kept
7 giving me more and more of the oxy -- Roxicodone, the little
8 blue ones. He was giving me more over time, over the years,
9 and I just thought --

10 THE COURT: Ma'am, just answer the question. All
11 right?

12 THE WITNESS: Oh, okay.

13 BY MR. LEE:

14 Q. Ma'am, you're still getting oxycodone today, aren't you?

15 A. Since I had surgery, yes. Oxycodone 5 milligrams.

16 Q. When did you ever stop getting oxycodone?

17 A. After Dr. Smithers. I believe he was the last person
18 that prescribed it to me until I had this bowel block and had
19 to have surgery.

20 Q. So your records show you've been getting oxycodone, in
21 essence, ever since you left Dr. Smithers's practice?

22 A. No.

23 Q. That's not true?

24 A. No.

25 Q. Okay.

1 A. I didn't get it until I had the bowel block. And then
2 there was a time -- the first surgery was in September -- or
3 November 22nd of 2017. And then he had -- I had -- it broke
4 loose and I had an incisional hernia and he had to operate in
5 September.

6 Q. Ms. Fisher, you stopped going to -- you didn't go to
7 Dr. Smithers in July of 2017, did you?

8 A. Whenever he closed. I don't remember the date.

9 Q. Okay. Well, you had something happen in your life that
10 prevented you from going to Dr. Smithers's office, didn't you?

11 A. I don't remember.

12 Q. Okay. Do you remember getting arrested in July of 2017?

13 A. I was thinking it was August.

14 Q. Okay. Do you remember getting arrested in August of
15 2017?

16 A. Yes.

17 Q. What were you arrested for?

18 A. They arrested me for felonies that were -- I was staying
19 with Larry Workman, and he was doing drug buys, or sales, or
20 whatever. And I was in his trailer. And there was one time
21 one girl had -- I loaned her money because she was dating my
22 nephew. She paid me back the money she owed me in Walmart.
23 And her mother was dying, and I know I shouldn't have, but I
24 loaned her some medication that -- for her mother.

25 Q. You were charged with drug distribution, weren't you?

1 A. I don't think so.

2 Q. Four counts of drug distribution?

3 A. No.

4 Q. What were you charged with?

5 A. I said three of the felonies was with Larry.

6 Q. What was your charge? Your criminal charge?

7 A. I don't know.

8 Q. Okay. And then --

9 A. Everything was dropped. I mean, nothing -- you know.

10 Q. But you gave -- you were at the Walmart --

11 A. Yeah, that's where I -- I thought I was loaning her
12 medication, and I thought she was paying me back, because I
13 still had her food stamp card. She gave it to me to hold
14 until she paid me. I thought the money she was giving me at
15 Walmart that day was for the food stamps. I knew she was
16 talking funny, but I didn't realize she was wired.

17 Q. It was Amanda Brewington (phonetic), wasn't it?

18 A. Yes.

19 Q. She was wearing a wire and cooperating with law
20 enforcement, wasn't she?

21 A. Right. That was before she kidnapped a baby.

22 Q. You gave her six oxycodone pills, didn't you?

23 A. I don't remember how many. Her mother was dying of
24 cancer and she asked for some.

25 Q. Okay. Do you remember testifying in front of the grand

1 jury?

2 A. I remember I was there.

3 Q. And do you remember telling the grand jury that you gave
4 Amanda Brewington six of your oxycodone pills?

5 A. Like I said, I don't remember how many it was because
6 it's been a while.

7 Q. I'm going to show you page 46 of your grand jury
8 testimony.

9 I'm going to ask you to read this to yourself,
10 beginning at lines 18.

11 A. You want me to read it out loud?

12 Q. No, I want you to read it to yourself.

13 A. Okay. Yeah.

14 Q. Does that refresh your recollection?

15 A. That's what I just said, that she owed me money. She
16 said, "Here's the money I owe you."

17 Q. After you gave her six OxyContin 20 pills?

18 A. There was a conversation on the phone before that. And
19 she said that her mother was running out of her pain
20 medication. And her mother was, like I said, dying of cancer.
21 I thought I was just loaning it to her. She said her mother
22 would go to the doctor, like, two or three days later and she
23 would pay me back.

24 Q. So you're at Walmart with your autistic nephew.

25 A. Yes.

1 Q. Who is 14 years old; correct?

2 A. Yes.

3 Q. And your grandson.

4 A. Yes.

5 Q. How old was he?

6 A. One or two at the time.

7 Q. And you gave Amanda Brewington six oxycodone 20s;
8 correct?

9 A. If that's what I wrote down there, I don't remember. It
10 said four or six, I wasn't sure.

11 Q. She said, "Here's the money I owe you." And you gave her
12 the pills?

13 A. I thought it was the money she owed me, like I said
14 before.

15 MR. LEE: No further questions, Your Honor.

16 THE COURT: All right. Any redirect?

17 MR. WILLIAMS: Yes, Your Honor.

18 **REDIRECT EXAMINATION**

19 BY MR. WILLIAMS:

20 Q. Ms. Fisher, when you went in to see Dr. Smithers, did he
21 talk to you about alternatives to medication?

22 A. Right. Yes.

23 Q. What all did he talk about?

24 A. He had talked about the probiotics and to -- I'm not sure
25 what else.

1 Q. Acupuncture?

2 A. Yeah.

3 Q. Okay. What about yoga?

4 A. Yeah. Because he said there was different things I could
5 do to make it feel better. And then to try to get moving
6 around more.

7 Q. Okay. Did you ever try that?

8 A. I did. But I've got that degenerative bone disease and
9 it hurt too bad.

10 Q. Okay. Now, did he talk to you about any other things,
11 other than just your pain?

12 A. Like what?

13 Q. I mean, did he help you with any other aspects of your
14 life? Aid or anything like that?

15 A. Yeah, we were always talking about stuff, but I don't
16 really remember everything that he said. He was always trying
17 to talk to me and to Larry to get us healthier and get off the
18 pain medication that we were on.

19 Q. Okay. Now, did you have to do drug screens when you were
20 there?

21 A. Yes.

22 Q. Okay. What about bring your pills in and pill counts and
23 stuff?

24 A. Yes.

25 Q. Okay.

1 A. You had to bring your medication in and Wendell would
2 count them.

3 Q. Okay. Now we talked a little bit about getting your
4 prescriptions filled and stuff like that. Was Dr. Smithers
5 ever trying to help you with that?

6 A. No.

7 Q. Okay. He didn't try to help you where you could get it
8 locally filled or anything?

9 A. No. The guy up front had told me about that -- he had
10 told Larry about that pharmacy, Mike's Pharmacy. We went
11 there a couple times. But he wouldn't take -- he couldn't
12 take no insurance. He couldn't take no insurance cards, so.

13 Q. Did he ever try to help you with someplace with
14 insurance?

15 A. Who?

16 Q. Dr. Smithers.

17 A. No.

18 Q. Okay.

19 A. Not that I remember.

20 Q. Did he ever help you with TRICARE, try to get your
21 medications approved or anything?

22 A. Not that I recall. I don't remember.

23 MR. WILLIAMS: No further questions.

24 THE COURT: Anything further?

25 MR. LEE: Just briefly, Your Honor.

RECROSS EXAMINATION

BY MR. LEE:

Q. Ms. Fisher, the six oxycodone pills that you sold to Miss Brewington --

A. I loaned them to her.

Q. Okay. Those came from a prescription written by Dr. Smithers, didn't it?

A. I'm not sure. Larry had some laying around that he had when he passed away, and I had those. So I'm not sure.

MR. LEE: If I could have one moment, Your Honor.

BY MR. LEE:

Q. Ma'am, do you remember testifying in front of the grand jury?

A. Like I said, I remember I was here, but I don't remember what I said. That was before I took all that heart medication.

Q. I'm going to show you what's going to be marked, excuse me, pages 49 and 50 of your grand jury testimony.

Ms. Fisher, if you'd read to yourself, starting at line 19 on page 49.

A. Right. That's what I just said. That I loaned her my medication. That's what I said in the grand jury, apparently.

Q. The question in the grand jury was: "And to be clear, the OxyContin pills that you gave to this lady in Walmart came from Dr. Smithers; is that right?"

1 And your answer was: "Yes," wasn't it?

2 A. Whether it was mine or Larry's, yeah, I don't recall.

3 Q. Okay. So regardless of whether it was your prescription
4 or Larry's, it would have come from a prescription written by
5 Dr. Smithers; correct?

6 A. Yes.

7 MR. LEE: No further questions, Your Honor.

8 THE COURT: Yes, sir.

9 MR. WILLIAMS: Your Honor, no further questions.

10 May she be excused?

11 THE COURT: Yes. The witness may be excused.

12 All right. You may take the witness out.

13 THE WITNESS: Thank you. Sorry about that for being
14 in a wheelchair.

15 THE COURT: Yes, ma'am.

16 You may call your next witness.

17 MR. WILLIAMS: Your Honor, the defense calls Lennie
18 Hartshorn.

19 Your Honor, if I may have just a second, I may have
20 to go find Mr. Hartshorn. I'm not sure where he went.

21 THE COURT: All right.

22 THE WITNESS: Where to?

23 THE CLERK: If you'll come forward, please.

24 If you'll raise your right hand.

25 Do you solemnly swear that the testimony you're

1 about to give in this case shall be the truth, the whole
2 truth, and nothing but the truth, so help you God?

3 THE WITNESS: Yes, ma'am.

4 THE CLERK: You may take the stand.

5 THE COURT: Yes, sir, you may proceed.

6 MR. WILLIAMS: Thank you, Your Honor.

7 **LENNIE HARTSHORN, JUNIOR,**

8 Called as a witness herein by the Defense, having been first
9 duly sworn, was examined and testified as follows:

10 **DIRECT EXAMINATION**

11 BY MR. WILLIAMS:

12 Q. Would you state your name for the record.

13 A. Lennie Hartshorn, Junior.

14 Q. Okay. And you spell your last name so that they can --

15 A. H-a-r-t-s-h-o-r-n.

16 Q. Okay. Now, Mr. Hartshorn, where do you live?

17 A. In Bolt, West Virginia.

18 Q. Okay. And how long have you lived there?

19 A. Since 1958; 61 years total.

20 Q. Okay. And do you know Dr. Smithers?

21 A. Yes, sir.

22 Q. How long have you known Dr. Smithers?

23 A. I'd have to guess. Approximately two years.

24 Q. Okay. Did you become a patient of his?

25 A. Yes, sir.

1 Q. Okay. And when did you become a patient of his, do you
2 recall?

3 A. Approximately two years ago I guess. I'm not sure for
4 sure.

5 Q. Would around September, October of 2016 sound about
6 correct?

7 A. Yes, that sounds about right.

8 Q. Okay. And why did you go to Dr. Smithers?

9 A. The pain clinics had been shut down. And one of the
10 people that had -- was working at that pain clinic I was going
11 to went to work for him and got me to be able to come see him
12 for pain management.

13 Q. Okay. Would that be the one in Wytheville?

14 A. Yes.

15 Q. Okay. And tell the members of the jury about what was
16 wrong with you.

17 A. What was wrong with me?

18 Q. Yeah.

19 A. I've had a lot of disks messed up in my neck and my back.
20 In the past year and a half I had four disks fused, lower back
21 cage, right hip replaced, and right knee replaced. Got to let
22 my body heal up before I can have my left knee replaced. And
23 hopefully then I'm going to go fishing in Alaska or something.
24 I had a whole a lot of things wrong.

25 Q. What was the start of all your injuries?

1 A. Excuse me?

2 Q. What kind of started all your injuries? Were you
3 involved in a mining accident?

4 A. Twenty-four years in a coal mine. I was working for
5 Hartford 11. Yeah, I was injured in mining several different
6 ways and times. I was able to keep working.

7 Q. Okay. Describe how you were injured.

8 A. I had rocks fall. I've had -- running a shuttle car, hit
9 holes in the -- in the roadway and it would throw you against
10 the steel canopy top and mess your neck up. On the rails, the
11 top was so low, they'd put pipes or rails across on top of 'em
12 on your mine trips and you could hit your head on it. We've
13 done that several times -- or I have. There are just a whole
14 lot of ways of getting injured in a coal mine. It's a very,
15 very dangerous place to be.

16 Q. Now, when you went to see Dr. Smithers, did you take
17 X-rays? MRIs? Anything like that when you went?

18 A. I took all my medical records.

19 Q. Okay.

20 A. Yeah, I had MRIs, X-rays, and I'd already had a neck
21 fusion one time. It was not successful. And I've been taking
22 pills, pain pills from my doctor in Beckley, which was like
23 Lortabs or something like that. And he had told me that --

24 THE COURT: Don't say what your doctor told you,
25 okay? Don't testify as to what your doctor told you.

1 THE WITNESS: Okay.

2 THE COURT: The question -- wait a minute. The
3 question was did you take your medical records? And you said
4 yes.

5 THE WITNESS: Yes, sir. Sorry.

6 BY MR. WILLIAMS:

7 Q. Okay. Now, when you went there, describe your first
8 visit with Dr. Smithers.

9 A. He was knowledgeable about what was going on. Explained
10 a lot of things to me that a lot of other ones hadn't. He was
11 very particular about what, you know, your medicine that you
12 were taking. You had to have a record of all that. I had a
13 list of all of them. He would talk to me about the
14 counteractions of one medicine versus the other. And I was
15 good on that. I didn't have any that conflicted with the pain
16 medicine itself.

17 Q. Okay. How long did he take with you that first visit; do
18 you recall?

19 A. I was there quite a -- quite a few hours. With him, his
20 self, probably at least a half hour, if not a lot longer.

21 Q. Okay.

22 A. He explained --

23 THE COURT: All right. You've answered the
24 question.

25 Just listen to the question and answer it.

1 THE WITNESS: Not add anything to it. All right.

2 Thank you.

3 BY MR. WILLIAMS:

4 Q. Did he talk to you? Did he do any kind of physical exams
5 or anything on you?

6 A. Yeah. He listened to my lungs and stuff, you know, blood
7 pressure.

8 Q. Okay. Did he check your back or anything?

9 A. Yeah. And my knee, yes.

10 Q. Okay. Now, when you went in, did you have to go through
11 drug testing or anything like that?

12 A. Yes.

13 Q. Okay. And did you ever have any problems with your drug
14 tests?

15 A. No.

16 Q. Did you have to do pill counts?

17 A. Yes.

18 Q. Okay. Did you ever have any problem with those?

19 A. No.

20 Q. Okay. Now as far as what kind of medication did
21 Dr. Smithers prescribe to you?

22 A. Oxycodone. I can't recall if there was anything else or
23 not. I don't think so.

24 Q. Okay. And how did it affect your pain, what he had given
25 you?

1 A. It made it tolerable where I could do things.

2 Q. Okay. When you say, "tolerable so you could do things,"
3 do things like what?

4 A. Just normal living. Be able to do a few things on the
5 farm, be able to enjoy life some. I have a convenience store,
6 it allowed me to help tinker around in that.

7 Q. Okay. So you weren't able to do that prior to this?
8 Prior to seeing Dr. Smithers?

9 A. Yes, because I had been seeing another doctor before.

10 Q. Okay. Without the medication, what was your life like?

11 A. Recliner. Laying in it, unable to really get out and
12 enjoy life.

13 Q. Okay. Now you're Heather Hartshorn's father; correct?

14 A. Yes.

15 Q. Okay. And I'm very sorry, okay.

16 Do you recall the day that Heather passed away?

17 A. Yes.

18 Q. Okay.

19 A. To some degree.

20 Q. Okay. Now I don't want to you tell me what you've heard
21 or what you've -- anything. But I want you to tell me what
22 you know personally, okay?

23 A. Yes.

24 Q. Okay. Did you see Heather that day?

25 A. Yes.

1 Q. Okay. What time did you see her?

2 A. Approximately 5:00 or 6:00 p.m.

3 Q. Okay. And where was that at?

4 A. At my convenience store.

5 Q. Okay. And was there anybody with her?

6 A. I think she had -- I'm sorry, thinking. She had one of
7 her sons with her and the father of the son.

8 Q. Okay. Was that someone she was involved with? Or dating
9 or anything?

10 A. Yes. That was a person that lived with her.

11 Q. Okay. So they lived together?

12 A. Yes.

13 Q. And where did they live together at?

14 A. At my home in Bolt.

15 Q. Okay. Did you see her at any point in time subsequent to
16 that? That night?

17 THE COURT: You mean after that?

18 BY MR. WILLIAMS:

19 Q. After that; correct.

20 A. No, not until I went back to the home about 6:00 a.m.

21 Q. Okay. Did you know -- do you have -- do you know
22 personally whether or not Heather was taking any kind of
23 prescription?

24 MR. RAMSEYER: Objection, Your Honor. Unless he has
25 personal knowledge.

1 THE COURT: Not on what somebody told you. Did you
2 see her take a controlled substance or any kind of
3 prescription?

4 THE WITNESS: That day or?

5 MR. WILLIAMS: Yes, that day.

6 THE COURT: Well, I don't know.

7 That day.

8 THE WITNESS: Again, I'd have to say -- did I
9 actually see her? No.

10 BY MR. WILLIAMS:

11 Q. Okay. Now, Heather had some problems; correct?

12 A. Yes.

13 Q. Okay. Had she ever threatened suicide to you?

14 A. She had -- I guess hearsay or something. She had
15 mentioned she would rather be dead than be in pain all the
16 time.

17 MR. RAMSEYER: Objection, Your Honor.

18 THE WITNESS: I don't know.

19 THE COURT: You can't -- yes. Ladies and gentlemen,
20 disregard that statement.

21 You can't testify as to what somebody told you, sir.

22 And, Mr. Williams, don't ask questions --

23 THE WITNESS: Then I can't answer that question.

24 MR. WILLIAMS: I'm sorry.

25 THE COURT: All right. Do you have any further

1 questions of the witness?

2 MR. WILLIAMS: May I ask?

3 THE COURT: All right.

4 BY MR. WILLIAMS:

5 Q. Did Dr. Smithers talk to you about alternative therapies
6 and stuff?

7 A. Yeah. We discussed that, yes.

8 Q. Okay. And what all did you discuss?

9 A. About physical therapy, surgeries. But where I hadn't
10 had such good luck out of the surgeries, that was a last
11 resort. And it finally got down to last resort and I have had
12 to have several surgeries.

13 Q. Okay. Mr. Hartshorn, do you blame Dr. Smithers for
14 anything?

15 A. No.

16 MR. WILLIAMS: No further questions.

17 **RECROSS-EXAMINATION**

18 BY MR. RAMSEYER:

19 Q. Mr. Hartshorn, your daughter died two days after getting
20 a prescription from Dr. Smithers; is that correct?

21 A. Yes.

22 Q. And were you the one that got her hooked up with
23 Dr. Smithers?

24 A. Was what?

25 Q. Are you the person that got her hooked up with

1 Dr. Smithers?

2 A. No.

3 Q. She was already going there before you?

4 A. I'm not sure. I think so --

5 Q. Where did she --

6 A. No. I don't know, because -- I really don't know.

7 Q. Where did you live at the time that you were going to
8 Dr. Smithers?

9 A. Fairdale, at my convenience store.

10 Q. Where?

11 A. Where did I live?

12 Q. Yes.

13 A. Fairdale.

14 Q. Fairdale, West Virginia?

15 A. Yes.

16 Q. Where did she live?

17 A. Bolt. At my home in Bolt.

18 Q. Bolt, West Virginia. How far apart are those places?

19 A. Five miles.

20 Q. Okay. Did you see her on a regular basis?

21 A. Yes.

22 Q. Okay. And so you don't know if she was going to
23 Dr. Smithers first or you were going to Dr. Smithers first?

24 A. No, I don't know for sure. She may have went before I
25 did. But I'm not sure because where they had shut down in

1 Wytheville, and he had just opened up his practice there, I
2 don't remember for sure if I got -- from the employee that let
3 me know that he was doing business there. I don't know if she
4 had a visit the week before me or a week after, that type of
5 thing, where he had just opened up. I really don't know.

6 Q. Did you see Dr. Smithers every time you went to the
7 office?

8 A. I think there was one time he was not there.

9 Q. There was more than one time, wasn't it?

10 A. I don't know. I can recall one time.

11 Q. Okay. The one time you went, he wasn't there, did you
12 know he wasn't going to be there?

13 A. No.

14 Q. How far had you driven to get there?

15 A. It's two and a half hours. I can't remember. Something
16 like that, two and a half, three hours.

17 Q. At least three hours, isn't it?

18 A. Again, I can't recall for sure. But probably two and a
19 half, three hours.

20 Q. Did you drive it?

21 A. No, I rode.

22 Q. Who drove?

23 A. Usually a man by the name of Wayne Tolliver would drive.

24 Q. Okay. Was he getting pills too?

25 A. Excuse me?

1 Q. Was he getting pills from Dr. Smithers too?

2 A. He getting a prescription, yeah, I guess.

3 Q. Yeah. Was he from your local area too?

4 A. Yes.

5 Q. Okay. Did you have to give him any of your pills for him

6 driving you?

7 A. No, sir.

8 Q. Okay. Did you ever give him any of 'em?

9 A. What?

10 Q. Did you ever give Wayne any of your prescriptions?

11 A. No.

12 Q. Okay. How much did you have to pay for the office visit?

13 A. I think it was 300.

14 Q. Okay. Was it --

15 A. Maybe 250 or 300, I don't recall.

16 Q. How did you pay it?

17 A. Cash.

18 Q. And where did you get the money from?

19 A. Out of my bank account.

20 Q. Okay. Did you have a job at the time?

21 A. No. I'm retired, disabled, and run a convenience store.

22 Q. Okay. So how did you pay for your prescriptions?

23 A. Out of my bank account.

24 Q. Did you pay cash for your prescriptions?

25 A. Oh yeah, cash.

1 Q. You had insurance though; right?

2 A. Yeah.

3 Q. Okay. So you could have used insurance to pay for your
4 prescriptions, couldn't you?

5 A. Not through them. They wasn't taking insurance yet.
6 They was getting set up for that, I was told.

7 Q. That's Mike's Pharmacy you're talking about? Which
8 pharmacy are you talking about that wouldn't take insurance?

9 A. My pharmacy always took my insurance.

10 Q. Your pharmacy did take your insurance?

11 A. Yeah. I thought you said the doctor.

12 Q. So you're talking about the doctor. Okay. So the doctor
13 took cash. The pharmacy took insurance.

14 A. Yeah.

15 Q. So now are there doctors in your area -- between your
16 place and Dr. Smithers, were there other doctors?

17 A. All kinds of doctors, but none that would --

18 Q. None that would write a prescription; right?

19 A. Right.

20 Q. That's why you went to Dr. Smithers was for the
21 prescription; correct?

22 A. Yeah. Where they shut 'em down, they just kept moving.
23 And they kept moving away instead of closer.

24 Q. Right. And Dr. Smithers prescribed over 1400 oxycodone
25 or oxymorphone pills to you; is that right?

1 A. I don't know.

2 Q. Well, he wrote to you every month from September of 2015
3 to July of 2017; isn't that right?

4 A. It could be. I don't have no dates.

5 Q. Dr. Smithers, he's a smart guy, isn't he?

6 A. Extremely, I think.

7 Q. Very smart. Correct?

8 A. I think so, in my opinion. Does that matter?

9 Q. That's what I asked for.

10 A. Okay.

11 Q. Now, who are the other people you knew that were going to
12 Dr. Smithers to get pills?

13 A. That I knew? Patty Dickens.

14 Q. Is that your girlfriend?

15 A. Yes. It is now, yeah.

16 Q. She didn't start out getting pills until you'd been
17 getting them for a while and then she decided to get some too;
18 right?

19 A. No.

20 Q. Well, were you a patient first or was she?

21 A. With Dr. Smithers?

22 Q. Yes.

23 A. I think we went down together, got a visit at the same
24 time.

25 Q. So you went together?

1 A. Yes.

2 Q. In September 2015?

3 A. It could be, yeah, I don't know.

4 Q. And you both got oxycodone and oxymorphone?

5 A. I'm really not sure if she got morphine or morphine or
6 codone. I don't know.

7 Q. Would she get a Schedule II drug? She got some Schedule
8 II drug.

9 A. Yes.

10 Q. And you went and filled them both; right? You filled her
11 prescriptions and your prescriptions.

12 A. We -- I filled mine and she filled hers.

13 Q. Did you fill them at the same place?

14 A. I usually -- I think I got all mine filled at Carry's
15 Drive Pharmacy.

16 Q. Where did she fill hers?

17 A. Mike's maybe, or...

18 Q. Mike's, that's the place in Wytheville?

19 A. Yes.

20 Q. Okay. All right. And you had to pay cash there, didn't
21 you?

22 A. I couldn't tell you. I think they had insurance that
23 took it there, I'm not sure.

24 Q. Okay. What other people did you know? You may have
25 mentioned Wayne Tolliver, obviously your daughter Heather,

1 Patty Dickens. Who else was going to the doctor to get pills?

2 A. I don't know who other patients he had.

3 Q. You knew some of the other people that went, didn't you?

4 A. No, sir.

5 Q. When you went down, you didn't recognize anybody from
6 your area?

7 A. No, sir.

8 Q. Those are the only four?

9 A. That I can recall, yes.

10 Q. Or three. Three plus you.

11 A. Yeah.

12 MR. RAMSEYER: May I just have a moment, Your Honor?

13 THE COURT: Yes, sir.

14 MR. RAMSEYER: That's all my questions. Thank you.

15 THE COURT: Any further questions?

16 MR. WILLIAMS: No further questions, Your Honor.

17 THE COURT: May this witness be excused?

18 MR. RAMSEYER: Yes, Your Honor.

19 MR. WILLIAMS: Yes, Your Honor.

20 THE COURT: Okay. Thank you, sir. You may step
21 down. And you're excused.

22 All right. Mr. Williams.

23 MR. WILLIAMS: Your Honor, we had discussed earlier
24 about a witness, and I have not had a chance to make a phone
25 call to check on that.

1 THE COURT: All right. Ladies and gentlemen, we're
2 going to take a break at this time. If you'll follow the
3 bailiff out.

4 (Proceedings held in the absence of the jury.)

5 THE COURT: All right. So can you call that person?

6 MR. WILLIAMS: I will try to get a phone call,
7 Judge. We've been trying -- I've been trying for a while and
8 I haven't been able to get in touch with her.

9 THE COURT: All right. We'll be in recess.

10 MR. WILLIAMS: Thank you, Your Honor.

11 (Proceedings suspended at 2:51 p.m. and resumed at 3:13
12 p.m.)

13 THE COURT: All right. Mr. Williams, do you have
14 any further witnesses?

15 MR. WILLIAMS: Your Honor, I have spoken with
16 Ms. Moore. I actually did get in touch with her. She lives
17 in Florida. She actually has followed -- indicated that she's
18 supposed to have a flight tonight. She's hoping to be able to
19 make that flight. However, she says that she does not know
20 whether she can be here today or tomorrow. And that's all
21 that I can advise the Court with what she said. We did not
22 have her subpoenaed. She had indicated she was going to
23 appear. We anticipated the trial going much longer and had
24 kind of indicated it would probably be the end of the week
25 before we anticipated needing her.

1 THE COURT: She said she had fallen?

2 MR. WILLIAMS: She said she fell last night and that
3 she was having some trouble getting around and that she hoped
4 to be able to make her flight tonight, but she was in a lot of
5 pain.

6 THE COURT: So we don't know when she's going to be
7 here?

8 MR. WILLIAMS: As of right now, no, sir.

9 THE COURT: Is she a former patient of the doctor's?

10 MR. WILLIAMS: She is.

11 THE COURT: Uh-huh.

12 Well, what's the Government's position?

13 MR. RAMSEYER: Your Honor, one thing, she is not one
14 of the patients where we've charged the prescription regarding
15 to her. So we're not sure what the relevance is going to be.
16 Although we did charge maintain a place, I guess it could
17 potentially go to that. Although the Court's instruction is
18 going to be that not every person had illegal prescriptions
19 necessarily. But, in any event, we'd like to get the trial
20 finished. It's kind of unclear as to whether she's going to
21 be here or not. I don't know how long we're going to put this
22 off. So that's the Government's position, Your Honor.

23 THE COURT: Yes, sir.

24 MR. WILLIAMS: Your Honor, Dr. Smithers has also
25 provided me the names of two pharmacists that he would like

1 for me to get in touch with. I have talked with him once
2 previously, but they have not committed to anything, so.

3 THE COURT: When did he provide you with these
4 names?

5 MR. WILLIAMS: He provided me with these names
6 approximately a week ago, two weeks ago, week and a half ago,
7 something like that. I actually spoke with them on the phone.
8 Neither wanted to really get involved with it. And so I spoke
9 with him about what that was --

10 THE COURT: Well, what would be the purpose of their
11 testimony?

12 MR. WILLIAMS: I think it would just be simply to
13 show that they had filled prescriptions for him and did not
14 have a problem filling his prescriptions.

15 THE COURT: Well, I mean, they haven't been
16 summonsed, I guess.

17 MR. WILLIAMS: They had not, Your Honor. And I
18 didn't really anticipate calling them until he mentioned that
19 to me, I think it was last night, about the possibility. And
20 so I spoke with them both on the phone real briefly. And my
21 decision kind of not to call them, but I didn't really feel
22 like -- but he is asking me to call them, so.

23 THE COURT: And, again, what's the name of the lady
24 who is in Florida --

25 MR. WILLIAMS: Deborah Moore.

1 THE COURT: -- and trying to get here?

2 MR. WILLIAMS: Deborah Moore.

3 THE COURT: Uh-huh.

4 Well, to give every opportunity here, particularly
5 since we thought this case was going to go much longer, I
6 mean, the information was there was going to be 70 or 80
7 witnesses, and it would have obviously gone -- and it was set
8 for a month, if not five weeks. I'll allow you to see what
9 you can do tomorrow for witnesses. But I don't think we can
10 go much farther than that. I mean, we do need to get this
11 resolved. The problem is if we just stretch it out trying to
12 find other witnesses, I just don't think that's the
13 appropriate way to proceed. It's not -- it's not fair to the
14 parties or the jury to do that.

15 Now, I do want to this afternoon go over the jury
16 charge. And I take it you don't -- you don't know whether
17 Dr. Smithers is going to testify or not?

18 MR. WILLIAMS: I think he is waiting with respect to
19 these witnesses to make that decision, Your Honor. That's
20 what he's indicated to me.

21 THE COURT: Well, I don't know what -- well, all
22 right.

23 Well, I'm going to excuse the jury and require them
24 to come back tomorrow. But if you have any further witnesses,
25 you need to present them tomorrow. All right?

1 MR. WILLIAMS: Thank you, Your Honor.

2 THE COURT: We'll have the jury in.

3 (Proceedings held in the presence of the jury.)

4 THE COURT: All right. Ladies and gentlemen, it
5 appears that we don't have any further witnesses at this time.
6 It's possible that we may have additional witnesses for the
7 defendant tomorrow. But for various reasons they are not
8 available at this time.

9 And so I'm going to let you go. Again, we're
10 getting very close to the end. And if you could be back at
11 9:00 in the morning. Please remember my instructions to you
12 about not discussing this case or permitting anyone to discuss
13 it with you. Don't do any research on any of the evidence
14 that you've heard. And don't listen or watch or read any news
15 accounts in the case.

16 And drive carefully. If you'll follow the bailiff
17 out, we'll see you tomorrow at 9:00.

18 (Proceedings held in the absence of the jury.)

19 THE COURT: All right. Let's take a moment and go
20 over the instructions. My law clerk is going to hand you some
21 new instructions.

22 All right. Counsel, I earlier provided you, and I
23 hope you received it, a copy of the proposed charge. I've
24 made the following changes. In Instruction No. 9, I believe
25 there was only one witness who testified that she had hope of

1 securing leniency in her case. So Instruction No. 9 I've
2 changed "witnesses" to just "witness".

3 15-A is a new instruction as to the burden of proof
4 and elements of Count 1.

5 Instruction No. 19, I've removed a sentence that
6 referred to the question of good faith because I realize that
7 I had gone into that at some length in a later instruction.
8 Actually, the next instruction, Instruction 20.

9 And then in Instruction No. 21, I changed that to --
10 in accord with the proposed verdict form by the Government --
11 to indicate that the question is whether the use of the
12 prescribed controlled substances in both Counts 298 and 299
13 resulted in the death of the patient involved.

14 In addition, of course, the Government has prepared
15 a verdict form, which I have adopted. I did make a minor
16 change I think to that. I think I added a question mark at
17 the end of the question about the death of the patient. In
18 any event, my law clerk has a copy of the verdict form to
19 supply.

20 Let me inquire at this time whether there are any
21 objections, comments, or other proposed jury instructions.

22 MR. RAMSEYER: Your Honor, we would ask the Court to
23 add an instruction that indicates when a medical provider
24 prescribes a controlled substance to a patient with the intent
25 that the prescription be filled, then under the law the

1 medical provider has caused the controlled substance to be
2 dispensed or distributed.

3 I believe the Court's given a similar instruction in
4 the past on that.

5 THE COURT: Yes, I will do that. Do you have a copy
6 of what I --

7 MR. RAMSEYER: Your Honor, I did earlier today, and
8 I must have taken it back with me at lunch time. I'll
9 provide -- I'll be happy to provide the Court and Mr. Williams
10 a copy of that by e-mail when we finish.

11 THE COURT: All right. Mr. Williams, that simply
12 says that I have done that in other similar cases. The
13 writing of a prescription to be filled is the distribution or
14 cause to be distribution of a substance.

15 MR. WILLIAMS: Okay. All right. Your Honor, if I
16 just may have a chance to look at it.

17 THE COURT: Yes, sir. Of course.

18 MR. WILLIAMS: I'll let you know if we have
19 objection.

20 MR. RAMSEYER: Your Honor, also, Instruction No. 19
21 uses "and" and Instruction No. 20 uses "or", about acting
22 without a legitimate medical purpose or beyond the bounds of
23 medical practice. And we believe they should both be "or". I
24 believe that's the law.

25 THE COURT: I think you're correct.

1 But, Mr. Williams, is that -- do you have any
2 comment there?

3 MR. WILLIAMS: Your Honor, I was going to raise the
4 same issue, but I think we believe it should be "and".

5 THE COURT: Well, I say "and" in the instructions, I
6 think. That's 15-A and 19; is that correct, Mr. Ramseyer?

7 MR. RAMSEYER: Excuse me. The two instructions?

8 THE COURT: Yes.

9 MR. RAMSEYER: I believe it was 19 and 20. In 19
10 it's "and" and in 20 it's "or".

11 Oh, actually, Mr. Juhan is showing me that in 15-A
12 it's also -- for the possession with intent to distribute, the
13 Court has "and" also. So I think it's 15-A, 19, and 20 should
14 all -- in the Government's view should all be "or".

15 THE COURT: Yes. In 20 I say "or".

16 MR. RAMSEYER: Correct. Yes, Your Honor.

17 THE COURT: Yes, sir.

18 All right. Anything else, Mr. Ramseyer?

19 MR. RAMSEYER: No, Your Honor. That's all for the
20 Government at this time.

21 THE COURT: All right. Mr. Williams?

22 MR. WILLIAMS: Your Honor, we would just like an
23 opportunity to be able to read the statute certainly with that
24 and/or language.

25 THE COURT: Right. Well, I'm not going to make any

1 final rulings at this time. You have no additional
2 instructions that you intend to offer, Mr. Williams?

3 MR. WILLIAMS: No, none at this time, Your Honor.

4 THE COURT: And the verdict form, Mr. Williams, you
5 have no --

6 MR. WILLIAMS: No objections.

7 THE COURT: -- no objection there?

8 And there's copies of the -- oh, I believe in
9 Count 1 I also added the "without a legitimate purpose." And
10 I guess the question there is also "or".

11 MR. RAMSEYER: Yes, Your Honor. I believe that's
12 15-A.

13 THE COURT: Well, I mean, on the verdict form it
14 says "and".

15 All right. Well, we're going to -- I understand the
16 parties' issues, I think, about the instructions. And we're
17 going to adjourn now and I will consider the requests that
18 have been made.

19 And Mr. Ramseyer is going to e-mail the Court and
20 the opposing counsel the proposed instruction about
21 prescriptions, and I'll look at that also.

22 Is there anything else that we need to take up?

23 If not, we will adjourn court.

24 (Proceedings concluded at 3:33 p.m.)
25

REPORTER'S CERTIFICATE

I, DONNA J. PRATHER, do hereby certify that the above and foregoing, consisting of the preceding 173 pages, constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 8th day of June, 2019.

S/Donna Prather

DONNA J. PRATHER, RPR, CRR, CBC, CCP
Federal Official Court Reporter

Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<div>\$</div>	54:22, 55:1, 68:20, 138:4 120 [6] - 22:20, 23:1, 25:18, 60:17, 82:9, 83:23 123 [1] - 2:7 12:07 [1] - 87:22 13 [2] - 85:16, 131:16 14 [8] - 54:13, 54:14, 56:8, 74:6, 74:18, 78:17, 81:14, 143:1 1400 [2] - 131:16, 160:24 143 [1] - 2:8 146 [1] - 2:8 148 [1] - 2:9 14th [4] - 55:9, 56:2, 62:22, 72:19 15 [9] - 17:4, 21:20, 25:17, 26:2, 55:3, 74:11, 79:25, 85:11 15-A [5] - 169:3, 171:6, 171:11, 171:13, 172:12 153 [1] - 39:23 154 [4] - 38:8, 38:9, 39:22, 40:3 155 [1] - 40:18 156 [1] - 2:10 15th [2] - 66:12, 138:4 16 [1] - 17:6 163 [1] - 46:5 169 [1] - 45:14 17 [4] - 17:7, 18:13, 66:7, 119:15 172 [2] - 41:15, 47:20 173 [1] - 47:22 174 [2] - 42:11, 47:23 175 [2] - 43:21, 43:24 17th [2] - 117:15, 138:4 18 [11] - 17:23, 18:12, 58:16, 64:8, 64:9, 76:1, 85:24, 86:4, 86:6, 119:3, 142:10 180 [2] - 1:20, 23:15 18th [7] - 42:2, 42:3, 42:15, 44:5, 70:20, 71:22, 75:22 19 [11] - 17:24, 18:11, 60:4, 60:6, 146:20, 169:5, 170:20, 171:6, 171:9, 171:13 1958 [1] - 148:19 1988 [1] - 65:9 1997 [2] - 6:9, 126:18 19th [2] - 60:2, 67:3	<div>1:08</div> [1] - 87:22 1:17-cr-00027-JPJ-PMS-1 [1] - 1:6 1st [6] - 19:14, 26:1, 30:6, 32:3, 68:9, 68:10	<div>2</div> <div>2</div> [10] - 14:14, 15:12, 34:14, 34:25, 43:2, 50:11, 59:14, 69:4, 74:18, 113:8 2,000 [1] - 117:17 2-20-17 [1] - 73:16 20 [17] - 18:2, 18:3, 21:13, 23:9, 47:4, 47:8, 47:9, 52:15, 122:18, 124:4, 142:17, 169:8, 170:21, 171:9, 171:10, 171:13, 171:15 20-milligram [1] - 47:4 2002 [1] - 7:12 2008 [1] - 8:3 2012 [3] - 80:5, 84:19, 94:10 2013 [2] - 52:5, 68:25 2014 [1] - 57:4 2015 [40] - 14:16, 15:2, 18:8, 20:4, 21:19, 25:16, 28:4, 29:15, 30:5, 30:6, 34:2, 38:13, 52:15, 52:22, 54:22, 57:5, 57:11, 60:2, 60:4, 63:12, 63:13, 65:10, 68:9, 68:10, 74:13, 75:10, 75:19, 77:24, 80:11, 80:14, 81:9, 81:12, 81:16, 81:20, 84:2, 84:14, 101:13, 161:2, 162:2 2016 [33] - 19:14, 29:24, 30:25, 31:10, 32:22, 33:1, 33:15, 33:19, 34:2, 35:15, 41:21, 42:3, 52:24, 56:2, 56:8, 59:9, 62:10, 66:8, 66:12, 68:21, 70:19, 70:20, 71:22, 75:20, 76:22, 76:24, 77:4, 77:24, 82:23, 84:4, 117:15, 138:4, 149:5 2017 [13] - 34:14, 43:1, 43:2, 46:8, 48:17, 64:23, 127:25, 138:5, 140:3, 140:7, 140:12, 140:15, 161:3 2018 [1] - 132:2 2019 [1] - 1:12 20s [1] - 143:7 21 [4] - 18:19, 78:17, 107:3, 169:9 21st [6] - 41:21, 44:3, 45:17, 63:25, 84:14, 85:7 22 [1] - 18:24 22nd [1] - 140:3 23 [1] - 19:1 23rd [2] - 70:19, 75:10 24 [6] - 14:16, 15:2, 19:2, 23:3, 64:22 24210 [1] - 1:21 24277 [1] - 1:24 24th [3] - 30:25, 68:20, 101:13 25 [3] - 2:16, 19:3, 66:11 250 [1] - 159:15 25th [1] - 32:12 26 [2] - 19:4, 44:3 26th [1] - 82:17 27 [3] - 19:5, 35:15, 65:10 28 [3] - 19:6, 62:14, 78:17 29 [7] - 19:7, 20:4, 33:12, 48:17, 74:13, 78:6, 78:25 298 [1] - 169:12 299 [1] - 169:12 29th [3] - 21:17, 22:16, 82:17 2:51 [1] - 164:11 2nd [7] - 32:22, 33:19, 62:14, 80:14, 82:12, 82:17, 82:20	<div>31</div> [2] - 19:11, 64:14 31st [5] - 57:5, 77:4, 78:5, 82:17, 83:23 32 [2] - 19:13, 64:15 326 [2] - 78:8, 78:12 329 [2] - 78:8, 78:12 33 [2] - 19:17, 64:16 34 [1] - 19:18 35 [1] - 19:19 36 [2] - 19:20, 20:2 37 [3] - 20:15, 54:6, 81:10 38 [1] - 20:16 39 [1] - 21:7 3:13 [1] - 164:11 3:33 [1] - 172:24 3rd [3] - 21:19, 25:16, 29:15
<div>,</div>	<div>'14</div> [2] - 52:12, 57:7 <div>'15</div> [5] - 24:2, 26:23, 52:19, 57:7, 67:3 <div>'16</div> [6] - 32:12, 40:1, 72:8, 72:19, 75:22, 117:18 <div>'em</div> [7] - 120:22, 121:8, 121:9, 122:21, 150:11, 159:8, 160:22 <div>'very</div> [1] - 35:20		<div>4</div> <div>4</div> [11] - 2:13, 2:14, 2:14, 2:15, 14:17, 14:19, 15:15, 15:17, 15:18, 35:4, 81:13 4-11 [1] - 31:8 4-22-16 [1] - 72:11 40 [6] - 21:9, 35:19, 55:10, 55:13, 82:7, 97:5 40s [1] - 83:24 41 [4] - 21:11, 21:24, 41:18, 63:17 42 [3] - 21:13, 23:6, 41:18 43 [1] - 23:22 44 [1] - 23:24 45 [2] - 23:25, 62:25 46 [2] - 24:1, 142:7 47 [2] - 24:2, 24:6 48 [2] - 26:14, 58:6 48-year-old [2] - 57:24, 58:3 48-year-old's [1] - 58:11 49 [3] - 26:15, 146:18, 146:20 4th [4] - 62:15, 82:16, 82:17, 82:18	
<div>1</div>	<div>1</div> [16] - 15:7, 24:2, 24:5, 34:10, 56:15, 57:10, 57:11, 68:23, 104:22, 105:9, 110:2, 110:9, 112:15, 112:16, 169:4, 172:9 1,000 [1] - 85:16 1.1 [1] - 26:22 10 [4] - 20:24, 38:13, 40:1, 122:2 100 [3] - 22:6, 22:14, 99:2 100% [1] - 24:14 1000 [1] - 2:15 107 [13] - 2:16, 25:7, 25:8, 25:10, 25:15, 29:12, 41:17, 42:14, 46:23, 62:12, 63:11, 83:21, 87:8 10:23 [1] - 50:22 10:30 [1] - 3:9 10:57 [1] - 50:22 10s [1] - 122:15 10th [3] - 39:17, 45:17, 45:18 11 [3] - 31:9, 57:4, 150:5 114 [1] - 39:16 117 [1] - 2:7 11th [1] - 55:2 12 [6] - 16:6, 33:15,	<div>2</div> <div>2</div> [10] - 14:14, 15:12, 34:14, 34:25, 43:2, 50:11, 59:14, 69:4, 74:18, 113:8 2,000 [1] - 117:17 2-20-17 [1] - 73:16 20 [17] - 18:2, 18:3, 21:13, 23:9, 47:4, 47:8, 47:9, 52:15, 122:18, 124:4, 142:17, 169:8, 170:21, 171:9, 171:10, 171:13, 171:15 20-milligram [1] - 47:4 2002 [1] - 7:12 2008 [1] - 8:3 2012 [3] - 80:5, 84:19, 94:10 2013 [2] - 52:5, 68:25 2014 [1] - 57:4 2015 [40] - 14:16, 15:2, 18:8, 20:4, 21:19, 25:16, 28:4, 29:15, 30:5, 30:6, 34:2, 38:13, 52:15, 52:22, 54:22, 57:5, 57:11, 60:2, 60:4, 63:12, 63:13, 65:10, 68:9, 68:10, 74:13, 75:10, 75:19, 77:24, 80:11, 80:14, 81:9, 81:12, 81:16, 81:20, 84:2, 84:14, 101:13, 161:2, 162:2 2016 [33] - 19:14, 29:24, 30:25, 31:10, 32:22, 33:1, 33:15, 33:19, 34:2, 35:15, 41:21, 42:3, 52:24, 56:2, 56:8, 59:9, 62:10, 66:8, 66:12, 68:21, 70:19, 70:20, 71:22, 75:20, 76:22, 76:24, 77:4, 77:24, 82:23, 84:4, 117:15, 138:4, 149:5 2017 [13] - 34:14, 43:1, 43:2, 46:8, 48:17, 64:23, 127:25, 138:5, 140:3, 140:7, 140:12, 140:15, 161:3 2018 [1] - 132:2 2019 [1] - 1:12 20s [1] - 143:7 21 [4] - 18:19, 78:17, 107:3, 169:9 21st [6] - 41:21, 44:3, 45:17, 63:25, 84:14, 85:7 22 [1] - 18:24 22nd [1] - 140:3 23 [1] - 19:1 23rd [2] - 70:19, 75:10 24 [6] - 14:16, 15:2, 19:2, 23:3, 64:22 24210 [1] - 1:21 24277 [1] - 1:24 24th [3] - 30:25, 68:20, 101:13 25 [3] - 2:16, 19:3, 66:11 250 [1] - 159:15 25th [1] - 32:12 26 [2] - 19:4, 44:3 26th [1] - 82:17 27 [3] - 19:5, 35:15, 65:10 28 [3] - 19:6, 62:14, 78:17 29 [7] - 19:7, 20:4, 33:12, 48:17, 74:13, 78:6, 78:25 298 [1] - 169:12 299 [1] - 169:12 29th [3] - 21:17, 22:16, 82:17 2:51 [1] - 164:11 2nd [7] - 32:22, 33:19, 62:14, 80:14, 82:12, 82:17, 82:20	<div>3</div> <div>3</div> [9] - 4:9, 14:16, 14:18, 15:14, 28:4, 79:9, 79:10, 86:4, 105:5 30 [21] - 19:9, 21:20, 22:18, 23:18, 25:18, 41:5, 47:8, 47:9, 55:4, 55:5, 55:10, 55:14, 55:15, 58:4, 63:1, 64:10, 68:12, 68:13, 120:15, 122:20, 124:5 300 [3] - 132:12, 159:13, 159:15 30s [2] - 83:23, 120:4 30th [4] - 18:8, 18:16, 18:18, 62:14	<div>5</div> <div>5</div> [9] - 2:3, 14:20, 15:18, 15:20, 16:2, 22:23, 26:23, 35:5, 139:15 5-18-16 [1] - 76:20 50 [9] - 13:10, 26:16, 26:20, 35:8, 47:2, 50:11, 124:19, 146:18 50-some [1] - 88:13

Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<p>51 [2] - 26:22, 91:16 52 [2] - 27:25, 46:25 53 [2] - 28:12, 35:12 54 [2] - 28:14, 86:4 57 [1] - 30:9 58 [1] - 30:10 59 [1] - 30:13 5:00 [1] - 154:2 5s [1] - 23:18 5th [9] - 30:5, 62:10, 62:15, 81:9, 81:12, 81:16, 81:19, 82:25</p>	<p>8</p> <p>8 [1] - 39:18 80 [2] - 32:24, 167:6 84 [2] - 55:12, 55:13 841(a) [1] - 107:3 862 [1] - 105:5 87 [1] - 33:6 88 [2] - 2:4, 33:7 89 [1] - 33:8 8:48 [2] - 18:16, 18:18 8th [1] - 45:24</p>	<p>68:7, 70:17, 77:19 Abuse [2] - 20:1, 32:6 abusing [1] - 60:14 accepted [1] - 61:16 accepting [1] - 46:15 access [1] - 89:11 accident [5] - 102:4, 102:11, 119:16, 119:17, 150:3 accidents [1] - 16:17 accord [1] - 169:10 according [12] - 40:16, 40:17, 40:25, 42:14, 43:24, 57:5, 59:3, 65:9, 68:8, 69:22, 82:24, 83:20 account [2] - 159:19, 159:23 accounts [1] - 168:15 accredited [1] - 7:1 accumulating [1] - 47:15 accurate [6] - 12:17, 27:23, 53:20, 53:21, 57:2, 99:19 accurately [1] - 17:22 acknowledge [1] - 28:24 acquittal [5] - 104:21, 105:7, 112:16, 112:22, 113:10 act [5] - 36:25, 37:6, 37:11, 37:20, 81:5 acting [1] - 170:21 action [2] - 8:15, 86:24 active [3] - 22:25, 81:4, 81:7 activity [1] - 54:17 acupuncture [1] - 144:1 acute [2] - 57:21, 58:1 add [4] - 22:5, 71:6, 152:1, 169:23 added [2] - 169:16, 172:9 addicted [1] - 68:11 addiction [12] - 36:15, 37:2, 40:12, 43:14, 44:21, 45:8, 68:7, 81:4, 81:8, 82:1, 82:3, 82:6 adding [1] - 22:13 addition [4] - 105:2, 129:6, 131:3, 169:14</p>	<p>additional [5] - 23:8, 23:14, 98:8, 168:6, 172:1 address [2] - 32:7, 33:20 adjourn [2] - 172:17, 172:23 adjudicate [1] - 8:14 adjunctive [1] - 74:21 administered [1] - 72:25 administrative [1] - 8:19 admissible [3] - 115:6, 115:16, 118:18 admission [1] - 25:6 admitted [2] - 4:17, 25:9 admitting [1] - 71:8 adopted [1] - 169:15 advise [1] - 164:21 advised [2] - 67:10, 76:22 advisement [1] - 112:16 affect [2] - 86:20, 152:24 afraid [3] - 45:5, 90:19, 99:23 afternoon [2] - 123:6, 167:15 age [1] - 58:4 agent [2] - 4:13, 137:13 agent's [1] - 107:4 aging [2] - 58:7, 58:11 ago [7] - 16:14, 102:2, 102:10, 149:3, 166:6 agree [9] - 27:6, 79:5, 89:4, 89:5, 98:6, 109:25, 110:1, 110:18, 111:1 agreed [2] - 90:13, 90:17 agreeing [1] - 111:23 agreement [6] - 74:14, 90:15, 90:16, 90:20, 91:1, 91:5 Agreement [1] - 74:8 Agreements [1] - 90:10 agreements [1] - 90:13 ahead [8] - 38:24, 71:4, 71:10, 86:12, 88:1, 118:23, 121:22, 122:7</p>	<p>ahold [2] - 113:18, 113:25 aid [1] - 144:14 Aided [1] - 1:25 AIDS [1] - 29:6 Alaska [1] - 149:23 alcohol [1] - 29:7 allegations [1] - 9:6 alleviate [1] - 92:18 allow [2] - 3:9, 167:8 allowed [4] - 91:2, 105:20, 115:11, 153:6 almost [3] - 13:10, 75:13, 102:22 alternative [2] - 95:23, 156:5 alternatives [1] - 143:21 Amanda [3] - 141:17, 142:4, 143:7 AMERICA [1] - 1:5 amount [4] - 22:12, 33:18, 91:10, 131:6 amounts [1] - 23:4 analgesics [1] - 74:21 analyzed [2] - 42:6, 72:25 anatomy [1] - 56:22 and [2] - 171:4, 172:14 anesthesiology [1] - 6:11 Angel [3] - 26:25, 27:3, 39:3 answer [9] - 10:2, 10:8, 17:14, 107:7, 118:24, 139:10, 147:1, 151:25, 155:23 answered [1] - 151:23 answers [1] - 10:12 anticipate [2] - 63:3, 166:18 anticipated [2] - 164:23, 164:25 anticipating [1] - 47:19 anyway [2] - 61:23, 82:24 apart [1] - 157:18 appear [14] - 44:14, 46:17, 64:20, 65:2, 65:3, 66:15, 66:16, 70:6, 78:14, 78:19, 92:5, 92:6, 94:20, 164:23 appearance [1] - 3:7 applicable [1] - 29:6 apply [1] - 107:21</p>
<p>6</p> <p>6 [8] - 1:11, 1:12, 15:1, 15:25, 35:6, 46:8, 67:24, 82:24 6-14 [1] - 72:8 6-21-16 [1] - 76:25 60 [17] - 20:24, 21:12, 22:2, 22:17, 23:13, 23:14, 25:17, 26:3, 30:15, 53:3, 62:22, 68:12, 68:13, 83:23, 97:5 60-milligram [1] - 22:17 600 [1] - 133:10 601 [1] - 1:23 61 [2] - 30:16, 148:19 62 [1] - 30:17 63 [1] - 30:18 66 [1] - 31:13 69 [2] - 32:3, 53:5 6:00 [2] - 154:2, 154:20 6th [1] - 82:20</p>	<p>9</p> <p>9 [6] - 32:25, 49:9, 58:23, 71:13, 168:24, 169:1 9-28 [1] - 80:8 90 [7] - 21:13, 23:8, 33:9, 33:22, 55:3, 55:4, 55:13 91 [2] - 33:10, 33:11 93 [1] - 38:11 94 [1] - 38:18 96 [2] - 33:20, 38:19 9:00 [2] - 168:11, 168:17 9:05 [1] - 3:1 9th [1] - 64:23</p>	<p>A</p> <p>a.m [4] - 3:1, 50:22, 50:23, 154:20 ability [1] - 102:17 ABINGDON [1] - 1:4 Abingdon [1] - 1:21 able [34] - 10:6, 12:4, 12:9, 12:19, 17:21, 27:22, 36:22, 37:9, 37:13, 95:1, 96:20, 96:24, 97:18, 97:23, 98:5, 98:25, 99:3, 99:4, 102:22, 108:18, 113:18, 113:24, 116:6, 121:3, 131:14, 149:11, 150:6, 153:4, 153:5, 153:7, 164:8, 164:18, 165:4, 171:23 abnormal [1] - 64:6 abnormality [2] - 57:21, 58:1 absence [5] - 50:8, 87:18, 104:14, 164:4, 168:18 absolutely [1] - 114:22 abuse [7] - 19:17, 19:24, 43:11, 59:21,</p>	<p>additional [5] - 23:8, 23:14, 98:8, 168:6, 172:1 address [2] - 32:7, 33:20 adjourn [2] - 172:17, 172:23 adjudicate [1] - 8:14 adjunctive [1] - 74:21 administered [1] - 72:25 administrative [1] - 8:19 admissible [3] - 115:6, 115:16, 118:18 admission [1] - 25:6 admitted [2] - 4:17, 25:9 admitting [1] - 71:8 adopted [1] - 169:15 advise [1] - 164:21 advised [2] - 67:10, 76:22 advisement [1] - 112:16 affect [2] - 86:20, 152:24 afraid [3] - 45:5, 90:19, 99:23 afternoon [2] - 123:6, 167:15 age [1] - 58:4 agent [2] - 4:13, 137:13 agent's [1] - 107:4 aging [2] - 58:7, 58:11 ago [7] - 16:14, 102:2, 102:10, 149:3, 166:6 agree [9] - 27:6, 79:5, 89:4, 89:5, 98:6, 109:25, 110:1, 110:18, 111:1 agreed [2] - 90:13, 90:17 agreeing [1] - 111:23 agreement [6] - 74:14, 90:15, 90:16, 90:20, 91:1, 91:5 Agreement [1] - 74:8 Agreements [1] - 90:10 agreements [1] - 90:13 ahead [8] - 38:24, 71:4, 71:10, 86:12, 88:1, 118:23, 121:22, 122:7</p>	<p>ahold [2] - 113:18, 113:25 aid [1] - 144:14 Aided [1] - 1:25 AIDS [1] - 29:6 Alaska [1] - 149:23 alcohol [1] - 29:7 allegations [1] - 9:6 alleviate [1] - 92:18 allow [2] - 3:9, 167:8 allowed [4] - 91:2, 105:20, 115:11, 153:6 almost [3] - 13:10, 75:13, 102:22 alternative [2] - 95:23, 156:5 alternatives [1] - 143:21 Amanda [3] - 141:17, 142:4, 143:7 AMERICA [1] - 1:5 amount [4] - 22:12, 33:18, 91:10, 131:6 amounts [1] - 23:4 analgesics [1] - 74:21 analyzed [2] - 42:6, 72:25 anatomy [1] - 56:22 and [2] - 171:4, 172:14 anesthesiology [1] - 6:11 Angel [3] - 26:25, 27:3, 39:3 answer [9] - 10:2, 10:8, 17:14, 107:7, 118:24, 139:10, 147:1, 151:25, 155:23 answered [1] - 151:23 answers [1] - 10:12 anticipate [2] - 63:3, 166:18 anticipated [2] - 164:23, 164:25 anticipating [1] - 47:19 anyway [2] - 61:23, 82:24 apart [1] - 157:18 appear [14] - 44:14, 46:17, 64:20, 65:2, 65:3, 66:15, 66:16, 70:6, 78:14, 78:19, 92:5, 92:6, 94:20, 164:23 appearance [1] - 3:7 applicable [1] - 29:6 apply [1] - 107:21</p>
<p>7</p> <p>7 [5] - 15:3, 16:1, 66:2, 122:12, 122:13 7-20 [1] - 52:19 7-20-15 [1] - 52:20 7-Eleven [1] - 119:3 70 [4] - 32:5, 45:19, 53:3, 167:6 71 [2] - 32:8, 84:23 72 [1] - 32:8 73 [1] - 32:9 74 [4] - 2:15, 4:14, 4:22, 32:10 75 [1] - 32:11 77 [1] - 32:15 78 [1] - 32:18 784 [2] - 83:21, 83:22 79 [1] - 32:21</p>	<p>9</p> <p>9 [6] - 32:25, 49:9, 58:23, 71:13, 168:24, 169:1 9-28 [1] - 80:8 90 [7] - 21:13, 23:8, 33:9, 33:22, 55:3, 55:4, 55:13 91 [2] - 33:10, 33:11 93 [1] - 38:11 94 [1] - 38:18 96 [2] - 33:20, 38:19 9:00 [2] - 168:11, 168:17 9:05 [1] - 3:1 9th [1] - 64:23</p>	<p>A</p> <p>a.m [4] - 3:1, 50:22, 50:23, 154:20 ability [1] - 102:17 ABINGDON [1] - 1:4 Abingdon [1] - 1:21 able [34] - 10:6, 12:4, 12:9, 12:19, 17:21, 27:22, 36:22, 37:9, 37:13, 95:1, 96:20, 96:24, 97:18, 97:23, 98:5, 98:25, 99:3, 99:4, 102:22, 108:18, 113:18, 113:24, 116:6, 121:3, 131:14, 149:11, 150:6, 153:4, 153:5, 153:7, 164:8, 164:18, 165:4, 171:23 abnormal [1] - 64:6 abnormality [2] - 57:21, 58:1 absence [5] - 50:8, 87:18, 104:14, 164:4, 168:18 absolutely [1] - 114:22 abuse [7] - 19:17, 19:24, 43:11, 59:21,</p>	<p>additional [5] - 23:8, 23:14, 98:8, 168:6, 172:1 address [2] - 32:7, 33:20 adjourn [2] - 172:17, 172:23 adjudicate [1] - 8:14 adjunctive [1] - 74:21 administered [1] - 72:25 administrative [1] - 8:19 admissible [3] - 115:6, 115:16, 118:18 admission [1] - 25:6 admitted [2] - 4:17, 25:9 admitting [1] - 71:8 adopted [1] - 169:15 advise [1] - 164:21 advised [2] - 67:10, 76:22 advisement [1] - 112:16 affect [2] - 86:20, 152:24 afraid [3] - 45:5, 90:19, 99:23 afternoon [2] - 123:6, 167:15 age [1] - 58:4 agent [2] - 4:13, 137:13 agent's [1] - 107:4 aging [2] - 58:7, 58:11 ago [7] - 16:14, 102:2, 102:10, 149:3, 166:6 agree [9] - 27:6, 79:5, 89:4, 89:5, 98:6, 109:25, 110:1, 110:18, 111:1 agreed [2] - 90:13, 90:17 agreeing [1] - 111:23 agreement [6] - 74:14, 90:15, 90:16, 90:20, 91:1, 91:5 Agreement [1] - 74:8 Agreements [1] - 90:10 agreements [1] - 90:13 ahead [8] - 38:24, 71:4, 71:10, 86:12, 88:1, 118:23, 121:22, 122:7</p>	<p>ahold [2] - 113:18, 113:25 aid [1] - 144:14 Aided [1] - 1:25 AIDS [1] - 29:6 Alaska [1] - 149:23 alcohol [1] - 29:7 allegations [1] - 9:6 alleviate [1] - 92:18 allow [2] - 3:9, 167:8 allowed [4] - 91:2, 105:20, 115:11, 153:6 almost [3] - 13:10, 75:13, 102:22 alternative [2] - 95:23, 156:5 alternatives [1] - 143:21 Amanda [3] - 141:17, 142:4, 143:7 AMERICA [1] - 1:5 amount [4] - 22:12, 33:18, 91:10, 131:6 amounts [1] - 23:4 analgesics [1] - 74:21 analyzed [2] - 42:6, 72:25 anatomy [1] - 56:22 and [2] - 171:4, 172:14 anesthesiology [1] - 6:11 Angel [3] - 26:25, 27:3, 39:3 answer [9] - 10:2, 10:8, 17:14, 107:7, 118:24, 139:10, 147:1, 151:25, 155:23 answered [1] - 151:23 answers [1] - 10:12 anticipate [2] - 63:3, 166:18 anticipated [2] - 164:23, 164:25 anticipating [1] - 47:19 anyway [2] - 61:23, 82:24 apart [1] - 157:18 appear [14] - 44:14, 46:17, 64:20, 65:2, 65:3, 66:15, 66:16, 70:6, 78:14, 78:19, 92:5, 92:6, 94:20, 164:23 appearance [1] - 3:7 applicable [1] - 29:6 apply [1] - 107:21</p>

<p>appointment [1] - 77:5</p> <p>appointments [2] - 125:14, 128:17</p> <p>appreciate [1] - 58:1</p> <p>approach [1] - 24:18</p> <p>appropriate [7] - 17:22, 27:23, 29:2, 58:12, 86:24, 97:10, 167:13</p> <p>appropriately [2] - 81:6, 82:2</p> <p>approved [3] - 91:7, 92:24, 145:21</p> <p>April [5] - 31:9, 35:15, 62:14, 82:17, 82:18</p> <p>area [5] - 12:24, 125:18, 159:3, 160:15, 163:6</p> <p>argument [1] - 61:20</p> <p>arm [1] - 80:20</p> <p>arrested [4] - 140:12, 140:14, 140:17, 140:18</p> <p>arrive [1] - 27:22</p> <p>arrived [1] - 12:20</p> <p>aside [1] - 112:1</p> <p>aspects [1] - 144:13</p> <p>Assessment [5] - 15:1, 26:22, 39:2, 91:18, 95:21</p> <p>assessment [5] - 10:3, 17:21, 27:9, 41:10, 100:13</p> <p>assigned [1] - 76:24</p> <p>assist [1] - 65:22</p> <p>assistant [1] - 97:5</p> <p>assume [10] - 20:23, 53:9, 53:18, 61:20, 78:20, 85:19, 85:23, 86:5, 86:16, 86:18</p> <p>assumed [2] - 13:11, 61:14</p> <p>assuming [7] - 13:15, 26:18, 45:11, 46:18, 61:24, 63:1, 63:25</p> <p>attempt [1] - 53:19</p> <p>attendance [1] - 113:19</p> <p>attention [2] - 3:5, 97:21</p> <p>Attorney [1] - 11:7</p> <p>Attorneys [2] - 1:20, 126:23</p> <p>auction [1] - 131:12</p> <p>audit [1] - 23:23</p> <p>Audit [2] - 15:7, 15:13</p>	<p>audits [1] - 17:6</p> <p>August [18] - 42:2, 42:3, 42:15, 44:5, 45:24, 45:25, 56:3, 57:5, 57:7, 59:8, 62:15, 67:14, 77:4, 78:5, 83:23, 84:2, 140:13, 140:14</p> <p>authorization [1] - 32:16</p> <p>authorizes [1] - 29:4</p> <p>authorizing [1] - 40:6</p> <p>autistic [1] - 142:24</p> <p>automatically [2] - 31:24, 56:20</p> <p>available [2] - 9:23, 168:8</p> <p>average [1] - 97:7</p> <p>aware [7] - 68:8, 80:8, 81:5, 89:3, 89:22, 89:25, 91:1</p>	<p>5:12, 5:16, 5:22, 5:24, 7:19, 9:15, 9:22, 10:16, 24:22, 51:9, 61:19, 88:8, 88:10, 103:1</p> <p>Battaglia [11] - 14:10, 16:4, 19:13, 22:16, 28:5, 29:19, 32:18, 33:25, 34:3, 91:21, 92:1</p> <p>Battaglia's [2] - 33:20, 91:22</p> <p>became [1] - 11:3</p> <p>Beckley [2] - 129:21, 150:22</p> <p>become [6] - 6:3, 6:18, 6:25, 7:24, 148:24, 149:1</p> <p>becoming [1] - 80:8</p> <p>begin [3] - 16:13, 52:22, 101:25</p> <p>beginning [3] - 10:6, 47:15, 142:10</p> <p>behalf [3] - 1:18, 1:22, 36:13</p> <p>BEHALF [1] - 2:13</p> <p>behave [3] - 36:25, 37:3, 45:8</p> <p>behavior [7] - 36:13, 38:3, 44:20, 44:21, 45:9, 70:16, 77:18</p> <p>behind [2] - 44:16, 116:11</p> <p>believes [2] - 35:18, 36:1</p> <p>belly [1] - 130:7</p> <p>beneficial [3] - 96:15, 98:2, 98:5</p> <p>benefit [3] - 58:9, 98:8, 99:4</p> <p>Benitez [2] - 40:22, 40:23</p> <p>best [3] - 118:13, 132:9, 132:22</p> <p>better [4] - 35:19, 96:24, 97:1, 144:5</p> <p>between [9] - 2:14, 8:24, 36:18, 36:22, 37:10, 90:22, 97:4, 97:5, 160:15</p> <p>beyond [4] - 105:18, 110:3, 110:15, 170:22</p> <p>BF-1 [2] - 66:2, 66:11</p> <p>BH-01 [1] - 74:6</p> <p>BH-16 [1] - 70:20</p> <p>BH-24 [1] - 70:9</p> <p>BH-31 [1] - 68:17</p> <p>bias [1] - 3:19</p> <p>biased [1] - 3:19</p> <p>bill [1] - 130:21</p>	<p>billing [2] - 34:17, 34:20</p> <p>birth [3] - 34:13, 60:20, 65:9</p> <p>bit [6] - 50:10, 77:12, 94:7, 101:25, 124:25, 145:3</p> <p>blah [2] - 60:20, 60:21</p> <p>Blair [8] - 34:9, 34:13, 41:17, 42:25, 43:3, 48:17, 49:21, 49:24</p> <p>blame [1] - 156:13</p> <p>blank [7] - 16:1, 30:9, 30:11, 30:14, 30:15, 75:1, 75:8</p> <p>blanket [1] - 90:6</p> <p>Blevins [4] - 2:13, 4:9, 51:7, 51:19</p> <p>block [2] - 139:18, 140:1</p> <p>blood [2] - 135:9, 152:6</p> <p>blow [5] - 28:20, 31:7, 35:13, 46:6, 73:14</p> <p>blue [1] - 139:8</p> <p>Bluff [1] - 19:25</p> <p>board [7] - 6:18, 6:20, 6:25, 7:8, 8:13, 8:17, 9:1</p> <p>Board [6] - 7:25, 8:4, 8:9, 8:11, 8:13, 32:6</p> <p>boards [1] - 7:3</p> <p>Bobby [1] - 74:5</p> <p>body [1] - 149:22</p> <p>Bolt [5] - 148:17, 154:14, 157:17, 157:18</p> <p>bone [2] - 119:10, 144:8</p> <p>borrowed [1] - 44:16</p> <p>bottle [8] - 107:8, 107:9, 107:10, 107:13, 108:4, 108:10, 109:22, 112:9</p> <p>bottled [1] - 111:5</p> <p>bottles [7] - 31:11, 39:25, 41:5, 41:8, 47:16, 79:15, 112:3</p> <p>bottom [7] - 18:5, 28:20, 63:16, 67:19, 75:11, 76:5, 76:15</p> <p>bounds [4] - 105:18, 110:3, 110:15, 170:22</p> <p>bowel [2] - 139:18, 140:1</p> <p>Bowman [6] - 51:22, 52:5, 52:21, 53:7,</p>	<p>54:5, 54:6</p> <p>Box [1] - 1:23</p> <p>brang [1] - 121:8</p> <p>break [5] - 3:9, 50:4, 50:7, 87:15, 164:2</p> <p>breakthrough [2] - 120:14, 124:8</p> <p>BRENDA [2] - 2:6, 116:22</p> <p>Brenda [4] - 66:1, 66:8, 115:25, 117:4</p> <p>Brewington [4] - 141:17, 142:4, 143:7, 146:4</p> <p>brief [3] - 19:21, 20:3, 30:15</p> <p>Brief [9] - 17:7, 23:25, 30:10, 31:6, 35:1, 64:11, 66:11, 73:20, 95:19</p> <p>briefly [2] - 145:25, 166:20</p> <p>bring [14] - 3:5, 31:11, 39:25, 41:8, 65:6, 73:16, 76:23, 79:14, 79:15, 88:1, 124:18, 136:23, 144:22, 145:1</p> <p>bringing [1] - 137:1</p> <p>broad [1] - 10:10</p> <p>broke [1] - 140:3</p> <p>broken [1] - 88:14</p> <p>brought [8] - 41:5, 120:23, 121:9, 136:19, 136:22, 137:20, 138:7, 138:13</p> <p>Brown [3] - 56:14, 57:4, 57:8</p> <p>Bryan [1] - 67:23</p> <p>Buffalo [2] - 125:2, 125:5</p> <p>bulging [1] - 119:10</p> <p>bunch [2] - 112:10, 122:21</p> <p>Buprenorphine [8] - 40:9, 40:11, 40:15, 43:23, 45:16, 55:24, 58:25, 59:4</p> <p>burden [2] - 105:1, 169:3</p> <p>business [1] - 158:3</p> <p>busy [3] - 11:21, 121:18, 131:2</p> <p>butalbital [1] - 48:10</p> <p>buys [1] - 140:19</p> <p>BY [135] - 2:3, 2:4, 2:7, 2:7, 2:8, 2:8, 2:9, 2:10, 5:11, 5:23, 7:18, 9:21, 13:17, 14:21, 15:6, 15:16, 16:5,</p>
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Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<p>16:10, 16:22, 17:9, 18:4, 18:14, 18:20, 19:8, 19:12, 20:5, 20:17, 21:16, 22:1, 23:7, 24:7, 24:21, 25:14, 26:21, 28:7, 29:9, 29:23, 30:3, 30:24, 31:14, 32:20, 33:13, 33:24, 34:16, 35:14, 38:14, 38:20, 39:1, 39:19, 39:24, 40:4, 40:20, 41:3, 41:16, 42:1, 42:13, 43:22, 45:23, 46:7, 48:2, 48:15, 48:21, 49:10, 49:22, 51:8, 52:4, 53:6, 54:8, 55:19, 56:16, 57:18, 58:17, 58:24, 59:17, 60:7, 60:22, 61:18, 62:11, 63:10, 63:24, 64:17, 65:1, 65:7, 65:18, 66:3, 66:14, 67:1, 67:18, 68:1, 68:19, 71:17, 71:24, 72:9, 72:18, 73:10, 73:15, 74:1, 74:7, 74:12, 74:19, 75:21, 76:16, 78:23, 79:13, 80:2, 80:15, 81:11, 82:14, 83:18, 84:10, 84:17, 85:1, 85:18, 86:3, 86:15, 87:7, 88:7, 92:13, 94:6, 98:19, 117:2, 118:22, 123:5, 124:23, 139:13, 143:19, 146:2, 146:11, 148:11, 151:6, 152:3, 154:18, 155:10, 156:4, 156:18</p> <p>bypass [2] - 120:21, 123:22</p>	<p>capturing [5] - 11:13, 27:20, 35:22, 69:11, 69:12</p> <p>car [8] - 16:17, 102:4, 102:11, 109:21, 119:16, 119:17, 119:21, 150:8</p> <p>card [2] - 33:14, 141:13</p> <p>cards [1] - 145:12</p> <p>Care [2] - 14:12, 33:15</p> <p>care [9] - 28:22, 28:23, 29:1, 53:25, 69:15, 82:1, 90:9, 135:3, 138:25</p> <p>careful [1] - 45:2</p> <p>carefully [1] - 168:16</p> <p>carried [1] - 111:11</p> <p>Carry's [1] - 162:14</p> <p>case [35] - 3:8, 3:20, 3:21, 5:3, 10:19, 23:1, 46:14, 58:3, 71:8, 72:22, 75:8, 92:20, 93:8, 97:14, 100:14, 103:9, 103:10, 104:3, 109:17, 110:13, 110:17, 110:21, 111:2, 111:3, 111:11, 112:19, 113:7, 114:4, 116:16, 148:1, 167:5, 168:12, 168:15, 169:1</p> <p>Case [1] - 1:6</p> <p>case-by-case [1] - 100:14</p> <p>cases [13] - 8:10, 8:13, 8:18, 9:5, 9:6, 9:9, 11:22, 12:16, 95:8, 97:14, 103:8, 110:12, 170:12</p> <p>cash [11] - 111:6, 130:16, 131:3, 131:22, 133:1, 133:11, 159:17, 159:24, 159:25, 160:13, 162:20</p> <p>caused [4] - 16:16, 94:15, 102:3, 170:1</p> <p>causing [1] - 53:18</p> <p>caution [1] - 115:10</p> <p>CC-1 [2] - 58:16, 58:23</p> <p>Cedar [1] - 19:25</p> <p>Center [1] - 6:12</p> <p>center [3] - 29:4, 68:3, 68:6</p> <p>certain [12] - 10:19, 30:6, 50:17, 90:4, 92:17, 94:23, 98:14, 100:5, 102:23, 112:2,</p>	<p>132:9</p> <p>certainly [24] - 29:20, 56:20, 58:12, 66:21, 76:9, 86:11, 93:11, 93:14, 94:25, 96:18, 98:10, 100:9, 102:19, 104:21, 104:24, 104:25, 105:2, 105:6, 112:5, 112:11, 115:9, 115:10, 115:11, 171:23</p> <p>certified [6] - 6:18, 6:20, 6:25, 7:8, 7:11, 33:19</p> <p>Certified [1] - 1:25</p> <p>CG-12 [1] - 67:17</p> <p>CG-38 [1] - 66:24</p> <p>chance [2] - 163:24, 170:16</p> <p>change [5] - 54:18, 54:23, 61:7, 61:22, 169:16</p> <p>changed [2] - 169:2, 169:9</p> <p>changes [3] - 26:2, 61:4, 168:24</p> <p>characteristic [1] - 50:16</p> <p>charge [11] - 81:13, 84:19, 85:5, 94:11, 94:13, 94:16, 141:6, 165:16, 167:16, 168:23</p> <p>charged [10] - 13:22, 29:14, 52:22, 128:25, 129:3, 129:5, 129:6, 140:25, 141:4, 165:14</p> <p>charges [2] - 81:23, 107:3</p> <p>Charleston [1] - 52:17</p> <p>Chart [1] - 2:16</p> <p>chart [27] - 26:1, 29:12, 34:17, 39:12, 41:17, 42:14, 45:15, 46:23, 47:21, 49:23, 51:18, 55:7, 55:8, 57:5, 62:12, 63:11, 66:17, 66:20, 67:11, 82:24, 83:20, 90:1, 90:2, 91:23, 93:10, 98:3, 113:5</p> <p>Chart-signed [1] - 2:16</p> <p>charted [2] - 99:10, 99:12</p> <p>charts [13] - 51:9, 53:8, 67:4, 69:22, 70:5, 78:18, 80:24, 85:13, 90:12, 98:21,</p>	<p>98:24, 99:16, 101:18</p> <p>check [7] - 15:17, 24:24, 80:4, 110:6, 135:14, 152:8, 163:25</p> <p>checked [4] - 100:21, 100:24, 118:2, 123:11</p> <p>checklist [4] - 30:4, 32:18, 39:16, 65:19</p> <p>Chicago [1] - 6:10</p> <p>chief [5] - 51:14, 101:21, 101:22, 112:20, 115:22</p> <p>childhood [2] - 118:15, 119:2</p> <p>choice [3] - 92:14, 93:19, 96:6</p> <p>choose [4] - 93:7, 93:15, 93:17, 93:20</p> <p>chronic [6] - 58:13, 79:21, 83:14, 95:4, 96:22</p> <p>chronically [1] - 47:13</p> <p>circle [1] - 125:15</p> <p>circled [2] - 34:22, 125:5</p> <p>circumstances [2] - 43:17, 118:20</p> <p>Clayton [1] - 58:14</p> <p>clear [4] - 118:15, 119:1, 119:4, 146:23</p> <p>clearly [3] - 35:24, 112:5, 136:7</p> <p>Clerk [1] - 104:1</p> <p>CLERK [6] - 5:1, 5:6, 104:2, 116:15, 147:23, 148:4</p> <p>clerk [4] - 3:22, 4:25, 168:20, 169:18</p> <p>Cleveland [1] - 126:7</p> <p>Client [1] - 15:7</p> <p>client [2] - 3:13, 103:15</p> <p>Clinic [5] - 16:12, 52:18, 60:3, 67:3, 129:18</p> <p>clinic [2] - 125:22, 149:10</p> <p>clinical [2] - 31:21, 86:23</p> <p>clinics [2] - 126:5, 149:9</p> <p>close [7] - 36:7, 62:4, 62:7, 87:2, 87:4, 113:20, 168:10</p> <p>closed [2] - 127:6, 140:8</p> <p>closer [1] - 160:23</p> <p>closure [1] - 52:18</p>	<p>coal [2] - 150:4, 150:14</p> <p>cocaine [3] - 84:11, 84:15, 85:5</p> <p>Code [1] - 107:2</p> <p>codes [2] - 34:20, 92:6</p> <p>codone [1] - 162:6</p> <p>cold [1] - 96:5</p> <p>Colegrove [1] - 58:15</p> <p>colleague [1] - 83:17</p> <p>collected [5] - 11:20, 44:2, 60:4, 75:18, 100:11</p> <p>collection [2] - 17:15, 27:9</p> <p>college [1] - 6:5</p> <p>coming [1] - 11:11</p> <p>commenced [1] - 3:1</p> <p>comment [1] - 171:2</p> <p>comments [1] - 169:21</p> <p>committed [1] - 166:2</p> <p>commonwealth [1] - 9:10</p> <p>communicated [1] - 11:6</p> <p>communication [1] - 75:7</p> <p>Community [4] - 16:12, 19:25, 32:6, 101:8</p> <p>compare [1] - 22:11</p> <p>compartment [1] - 111:6</p> <p>complaining [1] - 99:18</p> <p>complaint [1] - 51:14</p> <p>complaint" [1] - 101:21</p> <p>complaints [3] - 27:21, 70:2, 101:22</p> <p>complete [6] - 20:10, 20:12, 27:22, 27:23, 28:23, 28:25</p> <p>completed [1] - 6:9</p> <p>completing [2] - 6:17</p> <p>compliance [3] - 17:6, 23:22, 40:21</p> <p>Computer [1] - 1:25</p> <p>Computer-Aided [1] - 1:25</p> <p>concern [1] - 94:15</p> <p>concerned [2] - 11:4, 110:7</p> <p>concerning [4] - 54:19, 54:20, 62:25, 66:20</p>
C				
<p>cage [1] - 149:21</p> <p>Cagle [1] - 1:19</p> <p>cancer [4] - 119:12, 119:13, 141:24, 142:20</p> <p>Candy [1] - 66:23</p> <p>cane [1] - 130:12</p> <p>cannot [2] - 106:10, 106:12</p> <p>canopy [1] - 150:10</p> <p>capacity [1] - 96:23</p> <p>capture [3] - 11:9, 11:17, 11:25</p> <p>captured [1] - 93:10</p> <p>captures [1] - 17:16</p>				

Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<p>concerns [3] - 36:7, 36:12, 43:9</p> <p>concluded [1] - 172:24</p> <p>conclusion [2] - 14:1, 14:4</p> <p>conclusive [1] - 17:12</p> <p>condition [15] - 10:4, 10:13, 10:14, 27:10, 38:5, 41:11, 44:24, 45:1, 49:4, 83:13, 90:25, 92:19, 114:5, 130:10, 133:21</p> <p>confirm [1] - 103:23</p> <p>confirms [1] - 87:5</p> <p>conflicted [1] - 151:15</p> <p>confused [3] - 77:10, 77:22, 118:24</p> <p>confusing [1] - 69:23</p> <p>consent [3] - 14:15, 18:25, 32:11</p> <p>consider [3] - 12:21, 85:14, 172:17</p> <p>consideration [2] - 71:9, 100:14</p> <p>considered [3] - 22:4, 22:7, 79:20</p> <p>considering [2] - 76:10, 106:7</p> <p>consistencies [1] - 40:6</p> <p>consistent [6] - 36:14, 37:7, 45:9, 58:10, 71:2, 80:20</p> <p>consultation [1] - 70:1</p> <p>consulted [1] - 10:16</p> <p>consumed [1] - 43:15</p> <p>Contact [1] - 16:6</p> <p>contact [3] - 28:24, 32:10, 114:4</p> <p>context [2] - 80:19, 99:9</p> <p>Contin [10] - 21:19, 24:12, 25:17, 25:22, 26:2, 26:8, 28:17, 34:1, 67:14, 109:24</p> <p>continue [4] - 49:2, 52:24, 54:23, 56:2</p> <p>continued [5] - 28:25, 47:10, 54:19, 64:1, 82:15</p> <p>continues [5] - 42:25, 56:5, 64:3, 68:15, 85:10</p> <p>continuing [1] - 7:4</p> <p>contract [3] - 72:6,</p>	<p>77:6, 77:14</p> <p>contrary [1] - 100:9</p> <p>contributed [1] - 119:15</p> <p>control [3] - 35:17, 35:19, 39:6</p> <p>controlled [59] - 9:16, 9:23, 12:11, 12:16, 12:18, 13:6, 20:7, 27:7, 27:16, 28:8, 31:3, 31:23, 39:7, 39:8, 40:11, 43:5, 43:18, 48:9, 51:16, 55:25, 56:19, 57:1, 58:20, 59:6, 65:14, 70:10, 70:12, 70:13, 70:18, 75:5, 79:6, 83:10, 84:3, 84:4, 84:18, 105:14, 105:21, 105:23, 106:11, 106:13, 106:24, 107:5, 107:13, 107:17, 107:20, 107:21, 108:14, 108:15, 126:9, 126:10, 127:2, 127:4, 127:14, 128:10, 155:2, 169:12, 169:24, 170:1</p> <p>convenience [4] - 153:5, 154:4, 157:9, 159:21</p> <p>conversation [4] - 93:9, 118:17, 137:4, 142:18</p> <p>convicted [2] - 80:4, 112:18</p> <p>conviction [1] - 94:10</p> <p>cooperating [1] - 141:19</p> <p>copies [3] - 32:24, 136:4, 172:8</p> <p>copy [7] - 19:11, 32:3, 32:5, 168:23, 169:18, 170:5, 170:10</p> <p>copying [1] - 39:11</p> <p>correct [163] - 14:22, 14:25, 15:18, 17:3, 18:16, 18:18, 22:18, 22:20, 22:25, 23:5, 23:9, 23:10, 23:13, 23:14, 23:16, 23:17, 23:18, 23:20, 24:24, 24:25, 25:4, 25:18, 25:19, 26:9, 27:5, 28:8, 28:11, 29:14, 29:19, 29:25, 30:1, 38:15, 38:22, 40:9, 40:10, 40:25, 42:19,</p>	<p>42:21, 43:1, 43:2, 43:25, 44:1, 44:3, 44:4, 46:3, 46:4, 46:9, 46:10, 46:11, 46:12, 47:5, 47:6, 47:8, 48:8, 48:11, 48:13, 51:10, 51:11, 52:7, 52:10, 52:11, 52:19, 52:22, 52:23, 52:25, 53:1, 54:16, 55:11, 55:25, 56:6, 56:7, 56:12, 57:2, 57:11, 57:12, 57:15, 59:1, 59:2, 59:5, 59:6, 59:9, 59:10, 60:12, 60:13, 62:16, 62:17, 62:19, 62:20, 72:2, 74:23, 78:3, 78:4, 78:7, 78:16, 82:21, 83:4, 84:1, 84:19, 84:20, 87:11, 87:12, 88:11, 89:15, 89:18, 90:9, 91:7, 91:12, 92:9, 92:10, 92:18, 92:22, 93:2, 93:13, 93:22, 94:10, 94:13, 94:22, 95:1, 95:12, 96:2, 96:10, 96:17, 97:16, 97:20, 98:3, 98:14, 99:5, 99:11, 99:17, 100:22, 100:23, 102:7, 102:20, 103:6, 104:1, 106:23, 117:16, 123:12, 126:1, 126:6, 128:21, 129:3, 129:9, 129:15, 129:22, 130:4, 130:14, 131:8, 131:23, 132:15, 143:1, 143:8, 147:5, 149:6, 153:13, 154:19, 155:11, 156:20, 160:21, 161:7, 170:25, 171:6, 171:16</p> <p>Correct [2] - 9:5, 9:13</p> <p>corrected [1] - 107:4</p> <p>correctly [1] - 75:4</p> <p>corresponding [1] - 92:6</p> <p>cost [3] - 89:20, 92:21, 133:4</p> <p>counsel [4] - 87:19, 110:8, 168:22, 172:20</p> <p>counseling [1] - 10:12</p> <p>counselor [1] - 121:12</p> <p>count [7] - 85:24,</p>	<p>112:18, 113:8, 121:13, 122:11, 122:15, 145:2</p> <p>Count [14] - 46:25, 47:2, 55:12, 55:13, 83:21, 104:22, 105:9, 110:2, 110:9, 112:15, 112:16, 113:8, 169:4, 172:9</p> <p>counteractions [1] - 151:14</p> <p>Counts [5] - 41:18, 78:8, 78:12, 105:5, 169:12</p> <p>counts [11] - 52:22, 98:20, 98:21, 105:5, 112:23, 112:25, 113:11, 122:14, 141:2, 144:22, 152:16</p> <p>County [1] - 127:19</p> <p>couple [6] - 51:13, 120:8, 121:2, 130:6, 131:13, 145:11</p> <p>course [5] - 78:21, 88:14, 125:7, 169:14, 170:17</p> <p>COURT [141] - 1:2, 3:2, 3:6, 3:10, 3:12, 3:16, 4:2, 4:17, 4:24, 5:17, 7:14, 7:17, 9:18, 9:20, 13:16, 24:20, 25:9, 50:4, 50:9, 50:18, 50:20, 50:24, 51:1, 51:4, 61:12, 70:22, 70:25, 71:6, 86:8, 86:11, 87:14, 87:19, 87:24, 88:1, 88:3, 103:17, 103:19, 103:21, 104:1, 104:5, 104:9, 104:12, 104:15, 104:18, 105:8, 105:15, 105:25, 106:5, 106:10, 106:16, 106:20, 107:1, 107:11, 108:6, 108:12, 108:14, 108:16, 108:20, 108:25, 109:5, 109:14, 109:19, 109:25, 110:7, 110:23, 111:1, 111:9, 111:17, 111:19, 112:13, 113:9, 113:25, 114:6, 114:11, 114:18, 114:22, 115:1, 115:8, 115:13, 115:15, 115:18, 115:21, 116:2, 116:4, 116:8,</p>	<p>116:19, 118:19, 123:3, 139:10, 143:16, 145:24, 147:8, 147:11, 147:15, 147:21, 148:5, 150:24, 151:2, 151:23, 154:17, 155:1, 155:6, 155:19, 155:25, 156:3, 163:13, 163:15, 163:17, 163:20, 164:1, 164:5, 164:9, 164:13, 165:1, 165:6, 165:9, 165:11, 165:23, 166:3, 166:10, 166:15, 166:23, 167:1, 167:3, 167:21, 168:2, 168:4, 168:19, 170:5, 170:11, 170:17, 170:25, 171:5, 171:8, 171:15, 171:17, 171:21, 171:25, 172:4, 172:7, 172:13</p> <p>Court [14] - 1:25, 3:9, 3:15, 3:19, 4:7, 4:8, 103:24, 106:8, 110:18, 164:21, 169:22, 170:9, 171:13, 172:19</p> <p>court [1] - 172:23</p> <p>Court's [3] - 3:5, 165:17, 170:3</p> <p>courthouse [1] - 127:23</p> <p>courtrooms [1] - 12:6</p> <p>cover [3] - 3:8, 32:13, 90:4</p> <p>Craycraft [1] - 59:13</p> <p>credentials [1] - 7:4</p> <p>credit [1] - 33:14</p> <p>Criminal [1] - 1:6</p> <p>criminal [12] - 15:17, 15:21, 16:1, 16:4, 80:4, 100:24, 100:25, 101:1, 103:7, 103:9, 103:10, 141:6</p> <p>critical [1] - 37:13</p> <p>CROSS [4] - 2:4, 2:7, 88:6, 123:4</p> <p>cross [2] - 88:3, 123:3</p> <p>cross-examination [1] - 123:3</p> <p>CROSS-EXAMINATION [4] - 2:4, 2:7, 88:6, 123:4</p> <p>cross-examine [1] - 88:3</p>
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Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

cuff ^[1] - 68:25 Cumberland ^[2] - 19:25, 32:5 cup ^[1] - 5:12 current ^[3] - 16:16, 24:11, 24:16	108:17, 137:1, 137:13 dead ^[2] - 129:2, 155:15 deal ^[1] - 36:8 dealer ^[2] - 128:23, 129:9 dealing ^[1] - 128:25 Deanna ^[2] - 79:9, 101:11 death ^[3] - 93:23, 169:13, 169:17 Deborah ^[8] - 2:15, 4:12, 56:13, 57:4, 57:8, 113:17, 166:25, 167:2 deceive ^[1] - 102:16 December ^[16] - 55:9, 63:13, 63:25, 66:9, 66:12, 75:10, 75:18, 80:14, 82:12, 82:15, 84:14, 85:7, 85:11, 132:2, 132:3, 138:4 decide ^[2] - 8:15, 93:12 decided ^[2] - 114:13, 161:17 decision ^[11] - 11:18, 11:24, 12:9, 12:19, 12:20, 46:18, 49:2, 85:12, 93:12, 166:21, 167:19 decision-making ^[2] - 11:18, 46:18 decrease ^[2] - 41:4, 41:8 dedicate ^[1] - 8:25 DEENI ^[2] - 2:3, 5:7 Deeni ^[3] - 5:16, 5:21, 7:16 Defendant ^[2] - 1:9, 1:22 defendant ^[6] - 105:15, 107:16, 112:18, 114:13, 115:22, 168:7 Defense ^[2] - 116:23, 148:8 DEFENSE ^[1] - 2:5 defense ^[5] - 104:16, 104:20, 113:14, 115:25, 147:17 defines ^[1] - 89:3 definitive ^[1] - 28:23 degeneration ^[1] - 58:7 degenerative ^[3] - 58:11, 119:10, 144:8 degree ^[5] - 6:7, 10:13, 89:9, 96:20,	153:19 degrees ^[1] - 99:18 Delayed ^[1] - 76:5 deliver ^[3] - 80:5, 84:18, 85:6 delivery ^[1] - 30:22 denied ^[2] - 3:23, 90:8 denies ^[3] - 24:12, 24:16, 90:9 deny ^[2] - 112:21, 113:9 dependency ^[2] - 93:21, 93:23 deposition ^[2] - 122:12, 127:21 depth ^[3] - 10:3, 11:4, 91:22 Derakhshan ^[2] - 126:15, 139:6 describe ^[9] - 8:23, 36:20, 117:20, 117:24, 119:8, 119:17, 122:4, 150:7, 151:7 describing ^[4] - 17:18, 24:15, 69:6, 86:25 description ^[3] - 27:10, 69:4, 76:14 descriptions ^[1] - 68:22 designation ^[1] - 6:16 despite ^[1] - 64:2 destroy ^[1] - 121:23 detailed ^[2] - 56:22, 58:2 details ^[1] - 11:24 determination ^[2] - 95:10, 112:17 determine ^[3] - 79:8, 89:18, 96:9 diagnoses ^[4] - 34:19, 92:7, 92:8, 95:1 diagnosis ^[13] - 10:5, 11:11, 17:21, 27:23, 29:1, 36:6, 39:10, 39:13, 39:14, 53:20, 53:21, 79:18, 92:4 diagnostic ^[1] - 89:13 diagram ^[1] - 69:5 diaphoresis ^[1] - 24:13 diarrhea ^[1] - 24:13 Dickens ^[2] - 161:13, 163:1	diclofenac ^[2] - 28:9, 71:19 died ^[2] - 128:18, 156:19 difference ^[2] - 36:17, 37:13 different ^[27] - 8:21, 22:9, 22:10, 27:13, 36:24, 36:25, 37:6, 37:11, 37:12, 37:20, 43:6, 69:19, 80:23, 88:14, 89:7, 99:18, 99:21, 108:4, 126:4, 127:13, 130:10, 137:23, 144:4, 150:5 differentiate ^[2] - 36:22, 37:10 differently ^[2] - 111:24, 122:15 digging ^[1] - 112:9 Dilaudid ^[1] - 77:24 DIRECT ^[6] - 2:3, 2:7, 2:9, 5:10, 117:1, 148:10 direct ^[1] - 94:23 directing ^[1] - 70:4 direction ^[1] - 37:12 directly ^[1] - 5:18 disabled ^[1] - 159:21 discharge ^[8] - 28:2, 28:4, 29:13, 29:17, 38:12, 78:24, 82:23, 100:6 discharged ^[5] - 48:16, 48:24, 77:6, 82:25, 83:2 discharging ^[3] - 19:13, 32:4, 99:22 disclosure ^[1] - 32:18 discontinue ^[1] - 100:11 discontinued ^[1] - 78:21 discrepancies ^[1] - 29:3 discuss ^[3] - 50:9, 156:8, 168:12 discussed ^[2] - 156:7, 163:23 discussing ^[2] - 90:25, 168:12 discussions ^[1] - 114:16 disease ^[2] - 119:10, 144:8 disk ^[1] - 119:10 disks ^[2] - 149:19, 149:20 dismissal ^[1] - 94:11	dismissed ^[4] - 94:13, 94:16, 100:17, 113:1 disorder ^[3] - 36:15, 44:21, 45:8 dispenase ^[4] - 105:23, 106:13, 107:5, 107:14 dispensed ^[2] - 111:12, 170:2 dispensing ^[1] - 127:2 disposition ^[1] - 73:7 disregard ^[1] - 155:20 distances ^[1] - 49:13 distribute ^[11] - 91:2, 104:22, 105:17, 107:22, 108:10, 110:2, 110:20, 111:7, 112:1, 112:10, 171:12 distributed ^[1] - 170:2 distributing ^[2] - 112:6, 128:25 distribution ^[6] - 104:24, 112:6, 140:25, 141:2, 170:13, 170:14 distributions ^[1] - 29:14 DISTRICT ^[2] - 1:2, 1:3 divert ^[1] - 70:18 diverted ^[2] - 43:12, 43:13 diverting ^[1] - 37:2 DIVISION ^[1] - 1:4 DJ-1 ^[1] - 79:9 DJ-150 ^[1] - 101:3 doctor ^[78] - 5:17, 6:1, 6:3, 7:14, 11:14, 12:24, 17:11, 18:7, 20:6, 24:3, 24:14, 26:2, 27:16, 31:15, 31:18, 31:20, 35:21, 36:10, 37:8, 37:19, 39:11, 41:6, 46:15, 47:18, 48:16, 55:4, 56:1, 60:23, 65:13, 69:17, 69:18, 69:19, 69:22, 70:3, 70:9, 76:6, 83:5, 85:12, 88:19, 89:10, 96:8, 96:16, 97:3, 97:22, 99:3, 99:6, 99:10, 99:16, 102:15, 102:16, 103:21, 108:4, 108:5, 117:22, 123:8, 125:14,
---	---	---	---	--

<p>126:17, 126:19, 127:12, 128:6, 133:11, 134:10, 134:22, 135:18, 135:21, 135:25, 138:8, 138:22, 142:22, 150:22, 150:24, 150:25, 153:9, 160:11, 160:12, 163:1</p> <p>doctor's [11] - 26:16, 41:12, 46:13, 46:17, 69:7, 77:9, 79:17, 102:17, 122:9, 128:17, 165:9</p> <p>doctors [16] - 9:12, 12:3, 17:1, 62:2, 88:21, 94:19, 94:25, 100:5, 100:12, 118:3, 123:12, 126:3, 126:9, 160:15, 160:16, 160:17</p> <p>document [3] - 12:19, 101:5, 101:7</p> <p>documentation [4] - 37:17, 47:16, 53:17, 70:7</p> <p>documented [2] - 35:24, 75:7</p> <p>documenting [1] - 46:17</p> <p>dollar [1] - 21:2</p> <p>Donald [1] - 1:22</p> <p>done [12] - 7:6, 7:22, 37:25, 76:6, 89:17, 90:5, 90:7, 95:23, 109:13, 119:6, 150:13, 170:12</p> <p>Donna [1] - 64:7</p> <p>door [1] - 3:8</p> <p>dose [10] - 22:3, 24:11, 24:16, 26:11, 41:8, 42:20, 42:24, 48:19, 54:23, 83:14</p> <p>doses [7] - 22:4, 22:7, 27:11, 36:9, 38:1, 65:16, 78:7</p> <p>Dotson [1] - 64:7</p> <p>doubt [1] - 99:4</p> <p>down [49] - 18:5, 28:19, 31:16, 39:5, 40:18, 41:23, 42:4, 44:5, 52:2, 52:15, 57:13, 59:15, 60:11, 63:18, 64:18, 67:24, 71:23, 72:7, 75:11, 76:5, 76:14, 86:2, 86:13, 99:14, 101:24, 116:9, 119:21, 123:16, 124:4, 125:8,</p>	<p>126:21, 127:11, 127:18, 128:6, 128:9, 128:19, 129:20, 129:22, 138:25, 143:9, 149:9, 156:11, 157:25, 160:22, 161:23, 163:5, 163:21</p> <p>Dr [149] - 4:23, 5:12, 5:16, 5:21, 5:24, 7:19, 9:15, 9:22, 10:16, 10:20, 24:22, 27:8, 27:14, 29:18, 30:18, 34:4, 39:4, 40:15, 40:25, 43:24, 44:6, 48:7, 49:13, 49:17, 51:9, 52:9, 57:4, 59:3, 61:6, 61:19, 61:21, 62:4, 67:4, 68:8, 69:21, 69:24, 70:6, 74:15, 76:1, 77:1, 77:3, 79:2, 79:7, 80:7, 80:22, 81:16, 82:4, 82:16, 83:11, 85:20, 86:4, 86:17, 88:8, 88:10, 88:16, 89:11, 90:10, 91:1, 91:6, 92:8, 93:24, 93:25, 94:22, 95:14, 95:22, 98:11, 98:14, 98:20, 100:17, 100:20, 103:1, 111:4, 113:15, 114:3, 117:9, 117:21, 118:18, 119:25, 121:23, 123:8, 123:14, 124:13, 125:22, 126:8, 126:15, 127:7, 127:18, 128:2, 128:9, 128:13, 129:15, 129:24, 129:25, 130:3, 130:11, 130:14, 131:19, 131:25, 133:24, 134:13, 135:4, 135:11, 136:7, 136:11, 136:17, 136:20, 136:21, 137:16, 137:20, 138:14, 139:1, 139:6, 139:17, 139:21, 140:7, 140:10, 143:20, 145:4, 145:16, 146:7, 146:25, 147:5, 148:20, 148:22, 149:8, 150:16, 151:8, 152:21, 153:8, 156:5, 156:13, 156:20, 156:23, 157:1, 157:8, 157:23, 158:6, 159:1, 160:16, 160:20,</p>	<p>160:24, 161:5, 161:12, 161:21, 165:24, 167:17</p> <p>DR [1] - 2:14</p> <p>DR-1000 [2] - 4:11, 4:21</p> <p>drink [1] - 5:13</p> <p>Drive [1] - 162:15</p> <p>drive [5] - 38:3, 124:15, 158:20, 158:23, 168:16</p> <p>driven [2] - 43:14, 158:14</p> <p>driver's [2] - 19:11, 65:8</p> <p>driving [3] - 16:17, 119:19, 159:6</p> <p>dropped [1] - 141:9</p> <p>drove [3] - 125:20, 128:15, 158:22</p> <p>drug [42] - 29:7, 40:5, 40:12, 44:18, 44:20, 46:2, 52:12, 53:9, 53:10, 56:7, 56:9, 56:10, 59:6, 59:25, 60:12, 64:6, 72:24, 75:16, 76:2, 76:4, 76:18, 81:4, 81:7, 98:23, 98:24, 99:24, 100:7, 121:14, 128:23, 129:9, 135:10, 137:24, 140:19, 140:25, 141:2, 144:19, 152:11, 152:13, 162:7, 162:8</p> <p>Drug [1] - 125:19</p> <p>drugs [25] - 22:9, 22:10, 54:24, 56:3, 59:18, 60:8, 60:14, 64:1, 80:21, 80:22, 80:24, 81:13, 107:6, 108:8, 108:13, 108:18, 109:18, 109:20, 128:25, 129:1, 129:12, 136:18, 136:22, 137:1</p> <p>Drugs [1] - 133:19</p> <p>drugstore [1] - 132:18</p> <p>DT [1] - 72:19</p> <p>due [7] - 54:15, 54:16, 54:17, 76:5, 77:5, 77:6, 77:14</p> <p>duly [3] - 5:9, 116:24, 148:9</p> <p>during [3] - 50:15, 113:20, 117:25</p> <p>duties [2] - 8:8, 8:10</p> <p>duty [1] - 43:4</p>	<p>DWi-41 [1] - 84:6</p> <p>DWi-71 [2] - 84:16, 94:5</p> <p>dying [4] - 137:10, 140:23, 141:23, 142:20</p>	<p>E</p> <p>e-mail [2] - 170:10, 172:19</p> <p>early [1] - 37:9</p> <p>easier [4] - 8:23, 77:12, 122:11, 126:2</p> <p>easily [1] - 43:11</p> <p>ED [1] - 76:3</p> <p>education [1] - 7:5</p> <p>effects [4] - 20:22, 20:24, 24:16, 93:21</p> <p>eight [1] - 31:2</p> <p>either [6] - 24:15, 43:17, 95:1, 96:16, 106:19, 109:2</p> <p>EKGs [1] - 29:1</p> <p>Eleanor [1] - 127:18</p> <p>element [4] - 20:9, 90:22, 90:24, 112:12</p> <p>elements [2] - 11:12, 169:4</p> <p>emergency [1] - 28:22</p> <p>employee [1] - 158:2</p> <p>enclosed [1] - 30:19</p> <p>encounter [7] - 11:17, 20:10, 20:13, 27:22, 31:21, 70:3, 97:25</p> <p>encounters [1] - 11:13</p> <p>end [8] - 12:2, 12:5, 54:3, 64:13, 132:2, 164:24, 168:10, 169:17</p> <p>enforce [1] - 61:25</p> <p>enforcement [1] - 141:20</p> <p>enjoy [2] - 153:5, 153:12</p> <p>entire [4] - 13:12, 41:9, 99:7, 99:9</p> <p>entirely [1] - 58:10</p> <p>episode [2] - 16:16, 102:3</p> <p>equate [1] - 22:9</p> <p>equivalent [2] - 23:3, 23:5</p> <p>equivalents [3] - 22:6, 22:8, 22:14</p> <p>ER [6] - 32:25, 35:18, 67:11, 72:10, 85:9</p>	<p>especially [2] - 12:14, 46:21</p> <p>essence [1] - 139:21</p> <p>essential [1] - 90:22</p> <p>essentially [1] - 24:15</p> <p>evaluation [2] - 49:3, 82:3</p> <p>event [7] - 53:7, 79:19, 109:4, 112:17, 114:18, 165:19, 169:18</p> <p>eventually [1] - 133:19</p> <p>every-day [2] - 63:2, 96:21</p> <p>evidence [34] - 4:6, 18:6, 21:18, 25:7, 42:9, 58:6, 61:3, 61:5, 61:15, 81:4, 81:7, 81:25, 83:12, 86:16, 103:25, 104:23, 106:3, 106:7, 107:15, 107:25, 108:20, 108:23, 109:14, 110:10, 111:7, 112:19, 112:22, 113:2, 113:7, 115:7, 115:10, 115:22, 115:23, 168:13</p> <p>evidenced [1] - 77:18</p> <p>exact [2] - 89:7, 122:17</p> <p>exactly [6] - 37:4, 40:14, 118:1, 119:6, 130:1, 134:2</p> <p>exam [2] - 135:2, 135:12</p> <p>examination [2] - 7:3, 123:3</p> <p>EXAMINATION [16] - 2:3, 2:4, 2:7, 2:7, 2:8, 2:8, 2:9, 2:10, 5:10, 88:6, 117:1, 123:4, 143:18, 146:1, 148:10, 156:17</p> <p>examine [2] - 53:20, 88:3</p> <p>examined [5] - 5:9, 116:24, 117:23, 117:24, 148:9</p> <p>example [2] - 44:19, 70:16</p> <p>exams [1] - 152:4</p> <p>except [2] - 79:19, 112:25</p> <p>exception [1] - 115:15</p> <p>exchange [1] - 32:16</p>
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Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<p>excuse [12] - 4:13, 45:24, 46:15, 55:9, 68:20, 82:12, 82:18, 146:17, 150:1, 158:25, 167:23, 171:7</p> <p>excused [6] - 103:19, 103:21, 147:10, 147:11, 163:17, 163:21</p> <p>executed [1] - 137:16</p> <p>exhibit [2] - 24:22, 62:13</p> <p>Exhibit [14] - 4:8, 4:11, 4:14, 4:19, 4:20, 4:21, 4:22, 25:7, 25:10, 25:15, 29:12, 83:21, 87:8, 124:19</p> <p>EXHIBITS [1] - 2:12</p> <p>exhibits [1] - 103:24</p> <p>exist [1] - 12:1</p> <p>expenses [1] - 131:5</p> <p>experience [2] - 89:5, 106:22</p> <p>expert [8] - 9:15, 71:2, 108:3, 110:12, 110:13, 110:22, 110:25, 113:5</p> <p>expertise [1] - 71:3</p> <p>explain [5] - 13:19, 36:17, 78:8, 80:17, 138:20</p> <p>explained [3] - 74:14, 151:9, 151:22</p> <p>expressing [1] - 71:2</p> <p>extended [2] - 97:4, 123:23</p> <p>extreme [2] - 11:16, 110:14</p> <p>extremely [1] - 161:6</p>	<p>failed [5] - 52:12, 53:8, 77:4, 100:7, 112:11</p> <p>failing [2] - 99:24, 127:1</p> <p>failure [5] - 40:22, 40:24, 52:7, 76:17, 76:24</p> <p>fair [4] - 90:3, 93:6, 97:12, 167:13</p> <p>Fairdale [3] - 157:9, 157:13, 157:14</p> <p>faith [1] - 169:6</p> <p>faking [1] - 102:23</p> <p>fall [1] - 150:8</p> <p>fallen [1] - 165:1</p> <p>falling [1] - 102:4</p> <p>familiar [8] - 15:10, 15:21, 20:23, 75:23, 86:25, 88:24, 125:8, 132:13</p> <p>family [1] - 10:11</p> <p>far [14] - 17:11, 17:14, 31:20, 39:12, 89:10, 99:24, 113:18, 113:20, 124:10, 124:12, 128:9, 152:20, 157:18, 158:14</p> <p>farm [1] - 153:5</p> <p>faster [2] - 51:6, 135:24</p> <p>father [4] - 115:4, 121:20, 153:13, 154:7</p> <p>fax [5] - 30:18, 32:9, 32:13, 60:19</p> <p>FB-1 [1] - 34:10</p> <p>FB-2 [1] - 48:14</p> <p>FB-3 [1] - 49:20</p> <p>FDA [3] - 91:7, 91:8, 91:10</p> <p>Fearin [1] - 65:4</p> <p>February [6] - 46:8, 57:4, 57:7, 66:10, 68:16, 82:17</p> <p>federal [2] - 106:1, 107:16</p> <p>fell [2] - 102:10, 165:2</p> <p>fellowship [6] - 6:12, 6:14, 6:15, 6:17, 6:23, 7:1</p> <p>felonies [2] - 140:18, 141:5</p> <p>female [1] - 57:24</p> <p>fentanyl [1] - 34:2</p> <p>few [5] - 22:5, 101:17, 104:24, 151:19, 153:4</p> <p>field [4] - 7:20, 9:16,</p>	<p>9:22, 10:9</p> <p>figure [1] - 97:9</p> <p>figuring [1] - 64:6</p> <p>file [11] - 2:13, 2:14, 3:22, 4:9, 4:10, 11:13, 11:25, 33:25, 49:6, 52:18, 65:24</p> <p>files [41] - 10:17, 10:20, 10:25, 11:2, 11:3, 11:5, 11:7, 11:9, 11:12, 11:15, 12:1, 12:2, 12:4, 12:5, 12:6, 12:9, 12:18, 13:5, 13:8, 13:10, 13:19, 13:25, 15:22, 15:24, 50:14, 50:15, 50:17, 61:1, 62:1, 62:4, 65:24, 88:10, 88:13, 88:16, 88:18, 88:19, 88:20, 89:10, 103:5, 113:4</p> <p>filings [1] - 113:2</p> <p>fill [9] - 77:7, 77:14, 96:4, 96:7, 96:11, 125:11, 133:14, 162:13, 162:16</p> <p>filled [24] - 18:22, 24:5, 70:13, 70:14, 74:25, 75:4, 77:21, 86:20, 100:22, 101:13, 125:17, 132:24, 133:17, 133:22, 145:4, 145:8, 162:10, 162:12, 162:14, 166:13, 169:25, 170:13</p> <p>filling [5] - 17:1, 17:17, 17:18, 75:5, 166:14</p> <p>final [1] - 172:1</p> <p>finally [1] - 156:11</p> <p>financial [2] - 77:5, 89:22</p> <p>finish [2] - 47:21, 170:10</p> <p>finished [1] - 165:20</p> <p>Fioricet [1] - 48:9</p> <p>first [40] - 5:9, 7:15, 13:21, 18:10, 19:9, 24:4, 29:13, 29:20, 37:22, 39:9, 40:24, 41:24, 52:17, 53:17, 57:8, 66:6, 76:24, 77:11, 77:12, 79:8, 103:9, 105:9, 114:21, 116:23, 117:13, 117:20, 118:9, 119:2, 130:13, 131:21, 131:22, 132:18, 138:24, 140:2, 148:8,</p>	<p>151:7, 151:17, 157:23, 161:20</p> <p>First [2] - 72:19, 76:17</p> <p>Fisher [11] - 66:1, 66:8, 116:1, 116:5, 117:4, 117:7, 123:8, 140:6, 143:20, 146:3, 146:19</p> <p>FISHER [2] - 2:6, 116:22</p> <p>fishing [1] - 149:23</p> <p>five [5] - 22:24, 22:25, 76:7, 157:19, 167:8</p> <p>fixed [1] - 131:8</p> <p>flag [3] - 59:21, 59:22, 60:14</p> <p>flight [3] - 164:18, 164:19, 165:4</p> <p>Florida [2] - 164:17, 166:24</p> <p>flush [1] - 121:15</p> <p>flushed [2] - 121:16, 138:25</p> <p>folks [1] - 49:16</p> <p>follow [9] - 22:11, 25:24, 29:8, 50:6, 87:16, 99:25, 104:13, 164:2, 168:16</p> <p>follow-up [2] - 25:24, 29:8</p> <p>followed [2] - 12:22, 164:17</p> <p>following [2] - 70:3, 168:24</p> <p>follows [3] - 5:9, 116:24, 148:9</p> <p>food [2] - 141:13, 141:15</p> <p>foolproof [1] - 99:2</p> <p>FOR [1] - 1:3</p> <p>forever [1] - 93:18</p> <p>forgot [2] - 4:7, 137:22</p> <p>form [25] - 17:17, 17:19, 32:10, 75:3, 86:25, 91:15, 91:17, 95:14, 95:16, 95:17, 95:18, 95:25, 96:3, 96:6, 96:11, 101:12, 101:13, 101:16, 102:8, 111:8, 169:10, 169:15, 169:18, 172:4, 172:13</p> <p>Form [6] - 14:12, 16:6, 16:11, 26:22, 67:17, 101:9</p> <p>Form) [1] - 17:8</p> <p>former [1] - 165:9</p>	<p>forms [1] - 89:13</p> <p>formulate [1] - 10:7</p> <p>forth [1] - 114:16</p> <p>forward [2] - 4:24, 147:23</p> <p>foundation [1] - 49:5</p> <p>four [21] - 6:5, 8:5, 8:18, 8:22, 8:24, 9:11, 35:18, 42:9, 43:9, 63:5, 73:2, 78:14, 78:21, 124:17, 125:20, 128:15, 141:2, 143:10, 149:20, 150:4, 163:8</p> <p>four-year [1] - 6:5</p> <p>fraction [1] - 27:21</p> <p>fragment [2] - 4:9, 4:10</p> <p>Frank [8] - 34:8, 34:13, 41:17, 42:25, 43:3, 48:17, 49:21, 49:24</p> <p>frankly [4] - 36:25, 37:3, 77:22, 110:9</p> <p>free [1] - 18:1</p> <p>Friday [1] - 4:13</p> <p>friend [1] - 44:7</p> <p>friend's [1] - 44:17</p> <p>front [13] - 76:11, 83:20, 98:9, 99:8, 116:9, 119:18, 127:20, 136:2, 136:3, 136:15, 141:25, 145:9, 146:12</p> <p>full [4] - 8:6, 30:19, 108:4, 108:10</p> <p>functional [2] - 96:23, 97:2</p> <p>functionality [2] - 96:20, 97:1</p> <p>functioning [1] - 97:19</p> <p>fundamental [1] - 38:3</p> <p>funny [1] - 141:16</p> <p>furthermore [1] - 53:19</p> <p>fused [1] - 149:20</p> <p>fusion [1] - 150:21</p>
F				
<p>f-i-s-h-e-r [1] - 117:6</p> <p>face [5] - 92:14, 97:25, 134:3</p> <p>face-to-face [2] - 97:25, 134:3</p> <p>FaceTime [1] - 134:4</p> <p>facility [2] - 19:17, 19:25</p> <p>fact [11] - 6:20, 11:6, 26:7, 29:20, 29:24, 44:25, 54:25, 58:5, 97:9, 112:5, 136:21</p> <p>facts [7] - 61:3, 61:15, 107:18, 110:14, 111:2, 111:3, 111:23</p> <p>fail [1] - 53:10</p>	<p>failed [5] - 52:12, 53:8, 77:4, 100:7, 112:11</p> <p>failing [2] - 99:24, 127:1</p> <p>failure [5] - 40:22, 40:24, 52:7, 76:17, 76:24</p> <p>fair [4] - 90:3, 93:6, 97:12, 167:13</p> <p>Fairdale [3] - 157:9, 157:13, 157:14</p> <p>faith [1] - 169:6</p> <p>faking [1] - 102:23</p> <p>fall [1] - 150:8</p> <p>fallen [1] - 165:1</p> <p>falling [1] - 102:4</p> <p>familiar [8] - 15:10, 15:21, 20:23, 75:23, 86:25, 88:24, 125:8, 132:13</p> <p>family [1] - 10:11</p> <p>far [14] - 17:11, 17:14, 31:20, 39:12, 89:10, 99:24, 113:18, 113:20, 124:10, 124:12, 128:9, 152:20, 157:18, 158:14</p> <p>farm [1] - 153:5</p> <p>faster [2] - 51:6, 135:24</p> <p>father [4] - 115:4, 121:20, 153:13, 154:7</p> <p>fax [5] - 30:18, 32:9, 32:13, 60:19</p> <p>FB-1 [1] - 34:10</p> <p>FB-2 [1] - 48:14</p> <p>FB-3 [1] - 49:20</p> <p>FDA [3] - 91:7, 91:8, 91:10</p> <p>Fearin [1] - 65:4</p> <p>February [6] - 46:8, 57:4, 57:7, 66:10, 68:16, 82:17</p> <p>federal [2] - 106:1, 107:16</p> <p>fell [2] - 102:10, 165:2</p> <p>fellowship [6] - 6:12, 6:14, 6:15, 6:17, 6:23, 7:1</p> <p>felonies [2] - 140:18, 141:5</p> <p>female [1] - 57:24</p> <p>fentanyl [1] - 34:2</p> <p>few [5] - 22:5, 101:17, 104:24, 151:19, 153:4</p> <p>field [4] - 7:20, 9:16,</p>	<p>9:22, 10:9</p> <p>figure [1] - 97:9</p> <p>figuring [1] - 64:6</p> <p>file [11] - 2:13, 2:14, 3:22, 4:9, 4:10, 11:13, 11:25, 33:25, 49:6, 52:18, 65:24</p> <p>files [41] - 10:17, 10:20, 10:25, 11:2, 11:3, 11:5, 11:7, 11:9, 11:12, 11:15, 12:1, 12:2, 12:4, 12:5, 12:6, 12:9, 12:18, 13:5, 13:8, 13:10, 13:19, 13:25, 15:22, 15:24, 50:14, 50:15, 50:17, 61:1, 62:1, 62:4, 65:24, 88:10, 88:13, 88:16, 88:18, 88:19, 88:20, 89:10, 103:5, 113:4</p> <p>filings [1] - 113:2</p> <p>fill [9] - 77:7, 77:14, 96:4, 96:7, 96:11, 125:11, 133:14, 162:13, 162:16</p> <p>filled [24] - 18:22, 24:5, 70:13, 70:14, 74:25, 75:4, 77:21, 86:20, 100:22, 101:13, 125:17, 132:24, 133:17, 133:22, 145:4, 145:8, 162:10, 162:12, 162:14, 166:13, 169:25, 170:13</p> <p>filling [5] - 17:1, 17:17, 17:18, 75:5, 166:14</p> <p>final [1] - 172:1</p> <p>finally [1] - 156:11</p> <p>financial [2] - 77:5, 89:22</p> <p>finish [2] - 47:21, 170:10</p> <p>finished [1] - 165:20</p> <p>Fioricet [1] - 48:9</p> <p>first [40] - 5:9, 7:15, 13:21, 18:10, 19:9, 24:4, 29:13, 29:20, 37:22, 39:9, 40:24, 41:24, 52:17, 53:17, 57:8, 66:6, 76:24, 77:11, 77:12, 79:8, 103:9, 105:9, 114:21, 116:23, 117:13, 117:20, 118:9, 119:2, 130:13, 131:21, 131:22, 132:18, 138:24, 140:2, 148:8,</p>	<p>151:7, 151:17, 157:23, 161:20</p> <p>First [2] - 72:19, 76:17</p> <p>Fisher [11] - 66:1, 66:8, 116:1, 116:5, 117:4, 117:7, 123:8, 140:6, 143:20, 146:3, 146:19</p> <p>FISHER [2] - 2:6, 116:22</p> <p>fishing [1] - 149:23</p> <p>five [5] - 22:24, 22:25, 76:7, 157:19, 167:8</p> <p>fixed [1] - 131:8</p> <p>flag [3] - 59:21, 59:22, 60:14</p> <p>flight [3] - 164:18, 164:19, 165:4</p> <p>Florida [2] - 164:17, 166:24</p> <p>flush [1] - 121:15</p> <p>flushed [2] - 121:16, 138:25</p> <p>folks [1] - 49:16</p> <p>follow [9] - 22:11, 25:24, 29:8, 50:6, 87:16, 99:25, 104:13, 164:2, 168:16</p> <p>follow-up [2] - 25:24, 29:8</p> <p>followed [2] - 12:22, 164:17</p> <p>following [2] - 70:3, 168:24</p> <p>follows [3] - 5:9, 116:24, 148:9</p> <p>food [2] - 141:13, 141:15</p> <p>foolproof [1] - 99:2</p> <p>FOR [1] - 1:3</p> <p>forever [1] - 93:18</p> <p>forgot [2] - 4:7, 137:22</p> <p>form [25] - 17:17, 17:19, 32:10, 75:3, 86:25, 91:15, 91:17, 95:14, 95:16, 95:17, 95:18, 95:25, 96:3, 96:6, 96:11, 101:12, 101:13, 101:16, 102:8, 111:8, 169:10, 169:15, 169:18, 172:4, 172:13</p> <p>Form [6] - 14:12, 16:6, 16:11, 26:22, 67:17, 101:9</p> <p>Form) [1] - 17:8</p> <p>former [1] - 165:9</p>	<p>forms [1] - 89:13</p> <p>formulate [1] - 10:7</p> <p>forth [1] - 114:16</p> <p>forward [2] - 4:24, 147:23</p> <p>foundation [1] - 49:5</p> <p>four [21] - 6:5, 8:5, 8:18, 8:22, 8:24, 9:11, 35:18, 42:9, 43:9, 63:5, 73:2, 78:14, 78:21, 124:17, 125:20, 128:15, 141:2, 143:10, 149:20, 150:4, 163:8</p> <p>four-year [1] - 6:5</p> <p>fraction [1] - 27:21</p> <p>fragment [2] - 4:9, 4:10</p> <p>Frank [8] - 34:8, 34:13, 41:17, 42:25, 43:3, 48:17, 49:21, 49:24</p> <p>frankly [4] - 36:25, 37:3, 77:22, 110:9</p> <p>free [1] - 18:1</p> <p>Friday [1] - 4:13</p> <p>friend [1] - 44:7</p> <p>friend's [1] - 44:17</p> <p>front [13] - 76:11, 83:20, 98:9, 99:8, 116:9, 119:18, 127:20, 136:2, 136:3, 136:15, 141:25, 145:9, 146:12</p> <p>full [4] - 8:6, 30:19, 108:4, 108:10</p> <p>functional [2] - 96:23, 97:2</p> <p>functionality [2] - 96:20, 97:1</p> <p>functioning [1] - 97:19</p> <p>fundamental [1] - 38:3</p> <p>funny [1] - 141:16</p> <p>furthermore [1] - 53:19</p> <p>fused [1] - 149:20</p> <p>fusion [1] - 150:21</p>
G				
<p>GABA [1] - 26:17</p> <p>gabapentin [3] - 60:8, 71:19, 71:25</p> <p>Gabapentin [1] - 26:17</p> <p>Gap [1] - 1:24</p> <p>gastric [2] - 120:20, 123:22</p>	<p>failed [5] - 52:12, 53:8, 77:4, 100:7, 112:11</p> <p>failing [2] - 99:24, 127:1</p> <p>failure [5] - 40:22, 40:24, 52:7, 76:17, 76:24</p> <p>fair [4] - 90:3, 93:6, 97:12, 167:13</p> <p>Fairdale [3] - 157:9, 157:13, 157:14</p> <p>faith [1] - 169:6</p> <p>faking [1] - 102:23</p> <p>fall [1] - 150:8</p> <p>fallen [1] - 165:1</p> <p>falling [1] - 102:4</p> <p>familiar [8] - 15:10, 15:21, 20:23, 75:23, 86:25, 88:24, 125:8, 132:13</p> <p>family [1] - 10:11</p> <p>far [14] - 17:11, 17:14, 31:20, 39:12, 89:10, 99:24, 113:18, 113:20, 124:10, 124:12, 128:9, 152:20, 157:18, 158:14</p> <p>farm [1] - 153:5</p> <p>faster [2] - 51:6, 135:24</p> <p>father [4] - 115:4, 121:20, 153:13, 154:7</p> <p>fax [5] - 30:18, 32:9, 32:13, 60:19</p> <p>FB-1 [1] - 34:10</p> <p>FB-2 [1] - 48:14</p> <p>FB-3 [1] - 49:20</p> <p>FDA [3] - 91:7, 91:8, 91:10</p> <p>Fearin [1] - 65:4</p> <p>February [6] - 46:8, 57:4, 57:7, 66:10, 68:16, 82:17</p> <p>federal [2] - 106:1, 107:16</p> <p>fell [2] - 102:10, 165:2</p> <p>fellowship [6] - 6:12, 6:14, 6:15, 6:17, 6:23, 7:1</p> <p>felonies [2] - 140:18, 141:5</p> <p>female [1] - 57:24</p> <p>fentanyl [1] - 34:2</p> <p>few [5] - 22:5, 101:17, 104:24, 151:19, 153:4</p> <p>field [4] - 7:20, 9:16,</p>	<p>9:22, 10:9</p> <p>figure [1] - 97:9</p> <p>figuring [1] - 64:6</p> <p>file [11] - 2:13, 2:14, 3:22, 4:9, 4:10, 11:13, 11:25, 33:25, 49:6, 52:18, 65:24</p> <p>files [41] - 10:17, 10:20, 10:25, 11:2, 11:3, 11:5, 11:7, 11:9, 11:12, 11:15, 12:1, 12:2, 12:4, 12:5, 12:6, 12:9, 12:18, 13:5, 13:8, 13:10, 13:19, 13:25, 15:22, 15:24, 50:14, 50:15, 50:17, 61:1, 62:1, 62:4, 65:24, 88:10, 88:13, 88:16, 88:18, 88:19, 88:20, 89:10, 103:5, 113:4</p> <p>filings [1] - 113:2</p> <p>fill [9] - 77:7, 77:14, 96:4, 96:7, 96:11, 125:11, 133:14, 162:13, 162:16</p> <p>filled [24] - 18:22, 24:5, 70:13, 70:14, 74:25, 75:4, 77:21, 86:20, 100:22, 101:13, 125:17, 132:24, 133:17, 133:22, 145:4, 145:8, 162:10, 162:12, 162:14, 166:13, 169:25, 170:13</p> <p>filling [5] - 17:1, 17:17, 17:18, 75:5, 166:14</p> <p>final [1] - 172:1</p> <p>finally [1] - 156:11</p> <p>financial [2] - 77:5, 89:22</p> <p>finish [2] - 47:21, 170:10</p> <p>finished [1] - 165:20</p> <p>Fioricet [1] - 48:9</p> <p>first [40] - 5:9, 7:15, 13:21, 18:10, 19:9, 24:4, 29:13, 29:20, 37:22, 39:9, 40:24, 41:24, 52:17, 53:17, 57:8, 66:6, 76:24, 77:11, 77:12, 79:8, 103:9, 105:9, 114:21, 116:23, 117:13, 117:20, 118:9, 119:2, 130:13, 131:21, 131:22, 132:18, 138:24, 140:2, 148:8,</p>	<p>151:7, 151:17, 157:23, 161:20</p> <p>First [2] - 72:19, 76:17</p> <p>Fisher [11] - 66:1, 66:8, 116:1, 116:5, 117:4, 11</p>	

<p>GB-64 [1] - 51:23 GB-68 [1] - 52:3 GB-70 [1] - 53:2 general [7] - 6:9, 11:1, 21:21, 36:13, 56:17, 65:24, 78:19 generally [3] - 8:24, 10:2, 99:19 Geneva [3] - 51:22, 52:21, 53:7 gentleman [1] - 125:13 gentlemen [10] - 3:2, 4:2, 50:6, 71:6, 87:14, 104:12, 115:21, 155:19, 164:1, 168:4 George [1] - 66:23 girl [1] - 140:21 girlfriend [1] - 161:14 given [11] - 13:8, 47:10, 76:3, 76:21, 83:2, 91:11, 111:14, 111:15, 115:23, 152:24, 170:3 glove [1] - 111:6 goals [1] - 96:22 God [3] - 5:4, 116:17, 148:2 government [1] - 88:11 Government [21] - 4:4, 4:23, 5:8, 10:17, 88:18, 104:4, 104:5, 104:25, 105:2, 105:16, 110:1, 110:13, 111:22, 112:11, 112:25, 113:1, 114:9, 114:10, 169:10, 169:14, 171:20 Government's [21] - 4:8, 4:11, 4:19, 4:20, 4:21, 4:22, 25:7, 25:10, 87:8, 104:23, 105:10, 108:7, 109:16, 109:17, 110:10, 112:19, 115:22, 124:18, 165:12, 165:22, 171:14 graduate [1] - 6:5 graduated [3] - 6:9, 7:1, 7:23 grams [1] - 81:14 grand [10] - 127:20, 133:13, 134:17, 141:25, 142:3, 142:7, 146:12, 146:18, 146:22, 146:23</p>	<p>grandson [1] - 143:3 great [2] - 36:7, 49:12 greater [3] - 69:5, 69:9, 96:20 Greg [1] - 71:11 grounds [2] - 105:6, 105:7 guess [10] - 35:18, 61:13, 113:14, 148:23, 149:3, 155:14, 159:2, 165:16, 166:16, 172:10 guide [1] - 66:18 guy [9] - 23:2, 23:15, 49:11, 128:16, 136:2, 136:3, 136:15, 145:9, 161:5</p> <p style="text-align: center;">H</p> <p>H-a-r-t-s-h-o-r-n [1] - 148:15 habits [1] - 8:12 half [9] - 57:6, 131:5, 149:20, 151:20, 158:15, 158:16, 158:19, 166:6 hand [7] - 3:16, 5:1, 80:17, 81:24, 116:14, 147:24, 168:20 handed [1] - 3:14 handing [1] - 112:8 hands [1] - 12:2 handwriting [5] - 27:4, 27:14, 39:4, 77:2 handwritten [1] - 39:17 happy [1] - 170:9 hard [2] - 49:18, 72:13 harder [1] - 139:3 Harlow [4] - 67:23, 71:11, 71:14, 72:11 Harlow's [1] - 72:16 Hartford [1] - 150:5 Hartshorn [10] - 73:9, 115:4, 115:10, 147:18, 147:20, 148:13, 148:16, 156:13, 156:19 HARTSHORN [2] - 2:9, 148:7 Hartshorn's [1] - 153:13 Hassel [4] - 60:16, 60:20, 62:9, 62:13 HD [1] - 60:18</p>	<p>HD-1 [1] - 60:18 HD-120 [1] - 60:18 HD-20 [1] - 62:10 head [1] - 150:12 headache [2] - 22:3, 34:22 heal [1] - 149:22 health [3] - 29:7, 38:6, 89:2 Health [2] - 88:24, 89:1 Healthcare [2] - 16:12, 101:8 healthcare [1] - 8:12 healthier [1] - 144:17 hear [1] - 116:20 heard [3] - 115:22, 153:20, 168:14 hearings [2] - 8:20, 8:22 hearsay [5] - 115:6, 115:10, 115:13, 118:16, 155:14 heart [8] - 127:12, 132:3, 132:4, 134:20, 135:6, 135:7, 135:15, 146:15 heartburn [2] - 120:21, 121:5 Heather [8] - 73:8, 115:4, 153:13, 153:16, 153:24, 154:22, 155:11, 162:25 heavy [1] - 43:4 heightened [1] - 12:17 held [10] - 4:1, 50:8, 51:3, 87:18, 88:2, 104:14, 115:20, 164:4, 168:3, 168:18 hello [1] - 123:7 help [20] - 5:4, 10:7, 10:10, 11:9, 17:11, 24:17, 53:23, 89:18, 92:18, 92:19, 116:17, 122:6, 144:13, 145:5, 145:7, 145:13, 145:20, 148:2, 153:6 helped [3] - 53:22, 53:24, 99:17 helping [2] - 99:19, 125:13 helps [1] - 65:20 herbal [1] - 112:3 herein [3] - 5:8, 116:23, 148:8 hernia [2] - 130:6, 140:4 HH-2 [1] - 73:8</p>	<p>HH-70 [1] - 73:19 high [12] - 22:4, 22:7, 27:11, 36:2, 36:9, 43:11, 58:13, 65:16, 72:6, 77:5, 77:14, 83:14 high' [1] - 35:20 high-dose [1] - 83:14 high-level [1] - 58:13 high-risk [3] - 72:6, 77:5, 77:14 higher [1] - 26:11 highlight [13] - 38:12, 52:2, 54:7, 65:6, 67:24, 68:18, 74:18, 75:12, 76:14, 79:11, 80:1, 84:9, 85:17 highlighted [1] - 25:24 hip [3] - 57:25, 130:9, 149:21 histories [2] - 100:25, 101:1 history [2] - 97:16, 100:24 hit [2] - 150:8, 150:12 HIV [1] - 29:6 hmm [1] - 23:21 hold [2] - 35:12, 141:13 hole [1] - 130:7 holes [1] - 150:9 Holly [3] - 127:7, 128:2, 128:9 home [5] - 44:11, 83:3, 154:14, 154:20, 157:17 honest [1] - 90:17 honesty [1] - 90:24 Honor [85] - 3:4, 3:13, 4:5, 4:18, 9:14, 9:19, 13:14, 24:18, 25:6, 25:8, 50:12, 50:25, 51:5, 61:10, 61:17, 70:21, 79:23, 83:16, 86:9, 87:25, 88:5, 103:14, 103:16, 103:18, 103:20, 103:23, 104:3, 104:7, 104:11, 104:16, 104:20, 105:11, 105:21, 106:2, 106:25, 107:4, 107:24, 110:5, 111:13, 111:18, 111:21, 113:3, 113:13, 114:3, 114:15, 114:25,</p>	<p>115:25, 116:5, 118:16, 123:1, 123:2, 143:15, 143:17, 145:25, 146:10, 147:7, 147:9, 147:17, 147:19, 148:6, 154:24, 155:17, 163:12, 163:16, 163:18, 163:19, 163:23, 164:10, 164:15, 165:13, 165:22, 165:24, 166:17, 167:19, 168:1, 169:22, 170:7, 170:15, 170:20, 171:3, 171:16, 171:19, 171:22, 172:3, 172:11 HONORABLE [1] - 1:11 hooked [2] - 156:22, 156:25 hope [3] - 4:3, 168:23, 168:25 Hope [3] - 60:3, 67:2, 129:18 hoped [1] - 165:3 hopefully [1] - 149:23 hoping [1] - 164:18 Hopkins [1] - 74:6 Hospital [1] - 6:11 hospital [2] - 76:22, 76:23 hot [1] - 96:5 hotel [2] - 130:25, 131:4 hour [4] - 87:16, 87:21, 103:3, 151:20 hourly [1] - 103:3 hours [13] - 49:17, 118:12, 124:15, 125:20, 128:15, 131:2, 134:10, 151:19, 158:15, 158:16, 158:17, 158:19 house [3] - 125:13, 131:12, 133:3 housekeeping [1] - 113:14 Hubbard [2] - 75:9, 76:12 Hubbard's [1] - 77:23 huge [1] - 38:1 hundreds [2] - 37:23, 105:14 hurry [1] - 121:18 hurt [4] - 37:22,</p>
--	--	---	--	--

58:19, 122:25, 144:9 hurting [1] - 133:21 hurts [1] - 39:12 husband [2] - 128:17, 131:11 husband's [1] - 131:15 hydrocodone [3] - 52:6, 60:11, 67:7 Hydromorphone [1] - 78:1 hypotheses [1] - 86:10	incident [1] - 137:11 incisional [1] - 140:4 include [1] - 106:8 includes [1] - 48:10 including [3] - 29:5, 83:13, 93:23 income [4] - 131:8, 131:10, 131:11, 131:15 inconsistency [1] - 72:20 inconsistent [2] - 36:3, 75:15 increase [3] - 36:8, 36:10, 55:14 increased [3] - 31:22, 54:16, 54:17 increases [2] - 55:6, 55:10 indeed [2] - 43:9, 77:17 INDEX [1] - 2:1 indicate [10] - 21:14, 25:1, 40:8, 41:20, 44:6, 54:9, 64:18, 70:11, 74:2, 169:11 indicated [10] - 25:2, 28:25, 89:17, 99:17, 101:14, 115:3, 164:17, 164:22, 164:24, 167:20 indicates [15] - 18:15, 19:24, 26:25, 40:21, 43:7, 48:12, 52:5, 70:12, 75:22, 75:25, 80:3, 81:12, 81:16, 84:11, 169:23 indicating [3] - 34:17, 85:2, 100:21 indicating) [1] - 34:12 indication [2] - 67:19, 67:21 indictment [3] - 13:22, 107:2, 112:23 individual [3] - 8:16, 27:12, 105:12 individually [1] - 13:19 Indivior [1] - 3:8 inference [2] - 108:7, 108:9 information [11] - 11:8, 11:19, 29:6, 32:16, 60:20, 90:2, 99:7, 100:9, 100:15, 101:19, 167:6 ingredient [1] - 22:25 inherently [1] - 93:5	initial [5] - 3:7, 24:14, 95:20, 95:22, 117:25 Initial [4] - 26:22, 39:2, 91:17, 95:21 initialling [1] - 24:3 initials [1] - 85:24 injection [2] - 80:21, 80:25 injections [1] - 10:12 injured [4] - 119:3, 150:5, 150:7, 150:14 injuries [4] - 89:18, 93:1, 149:25, 150:2 injury [1] - 89:7 ink [1] - 27:14 inquire [1] - 169:20 instance [2] - 22:16, 94:2 instead [6] - 44:16, 63:4, 82:4, 93:18, 124:4, 160:23 instituted [1] - 98:20 instructed [1] - 28:24 Instruction [6] - 168:24, 169:1, 169:8, 169:9, 170:20, 170:21 instruction [10] - 106:8, 110:8, 165:17, 169:3, 169:5, 169:7, 169:8, 169:23, 170:3, 172:20 instructions [10] - 26:16, 87:17, 168:11, 168:20, 168:21, 169:21, 171:5, 171:7, 172:2, 172:16 insufficient [3] - 17:21, 27:11, 49:3 insurance [25] - 12:5, 20:25, 21:5, 89:25, 90:1, 90:9, 92:24, 130:18, 130:21, 130:22, 132:16, 133:2, 133:3, 145:12, 145:14, 160:1, 160:3, 160:5, 160:8, 160:9, 160:10, 160:13, 162:22 insurances [1] - 90:3 Intake [4] - 14:12, 16:11, 67:16, 101:9 intend [2] - 50:12, 172:2 intended [4] - 28:23, 50:14, 50:16, 115:3 intent [16] - 70:17, 77:19, 80:5, 84:18, 85:6, 102:15, 104:22,	105:17, 107:22, 108:10, 110:2, 110:19, 111:7, 111:25, 169:24, 171:12 intentions [1] - 41:12 interesting [1] - 52:15 international [1] - 89:2 internship [1] - 6:9 interpret [1] - 44:12 interpreted [2] - 58:10, 99:8 interviewed [1] - 114:10 intravenous [1] - 80:20 intravenously [2] - 80:24, 81:2 introduce [8] - 4:6, 4:8, 4:11, 4:14, 5:15, 106:3, 106:6 introduced [3] - 61:5, 61:15, 103:25 Inventories [2] - 64:11, 73:20 Inventory [7] - 17:8, 23:25, 30:10, 31:6, 35:1, 66:12, 95:19 inventory [4] - 19:21, 20:3, 24:4, 30:15 involved [7] - 7:24, 8:17, 9:5, 150:3, 154:8, 166:8, 169:13 involves [1] - 104:22 involving [1] - 8:11 IR [4] - 41:5, 66:4, 75:13 isolation [1] - 58:21 issue [4] - 35:17, 81:19, 114:12, 171:4 issued [11] - 10:21, 34:3, 47:1, 48:6, 48:23, 49:24, 58:20, 66:7, 78:15, 86:21, 87:10 issues [2] - 77:5, 172:16 item [1] - 99:7 itself [3] - 39:14, 58:21, 151:16 IV [1] - 80:20	82:17, 138:4 Jason [2] - 54:5, 54:6 JB-119 [1] - 55:18 JDO [1] - 18:6 Jerry [2] - 2:14, 4:10 Jessie [2] - 79:10, 101:11 Jessie's [2] - 101:16, 102:7 Jewell [2] - 79:25, 80:3 JHa-9 [1] - 71:12 JMay [1] - 4:9 JMay-3 [2] - 2:14, 4:20 job [2] - 121:22, 159:20 Joel [2] - 2:14, 18:7 JOEL [1] - 1:8 John [1] - 71:11 joint [1] - 119:13 JONES [1] - 1:11 Jr [1] - 1:22 Judge [2] - 114:8, 164:7 judge [4] - 71:7, 98:6, 99:4, 99:6 JUDGE [1] - 1:11 judgment [9] - 77:6, 77:14, 100:13, 104:21, 105:7, 112:16, 112:21, 113:10 Juhan [2] - 1:19, 171:11 July [16] - 14:16, 15:2, 41:21, 44:3, 45:17, 52:15, 52:24, 56:3, 59:8, 70:20, 82:23, 82:25, 140:7, 140:12, 161:3 June [12] - 19:14, 32:3, 32:22, 33:19, 56:2, 56:8, 62:14, 68:20, 72:19, 76:23, 82:20 JUNIOR [2] - 2:9, 148:7 Junior [1] - 148:13 JURY [1] - 1:11 jury [51] - 3:24, 3:25, 4:1, 5:15, 11:1, 13:20, 36:17, 50:8, 50:24, 51:1, 51:3, 63:23, 78:9, 80:18, 87:18, 87:24, 88:1, 88:2, 104:9, 104:13, 104:14, 106:8, 107:12, 107:19,	
I	ICD [1] - 34:20 ICD-9 [1] - 92:6 idea [3] - 102:19, 136:21, 138:6 identify [1] - 82:2 II [15] - 12:11, 13:1, 13:6, 28:10, 38:21, 40:11, 43:18, 56:19, 84:3, 105:23, 106:13, 106:24, 108:13, 162:7, 162:8 III [2] - 38:15, 59:6 IIIs [1] - 28:11 illegal [3] - 29:14, 81:13, 165:18 illegally [1] - 127:1 illicit [2] - 40:6, 115:5 imagine [2] - 49:18, 86:23 impact [1] - 102:16 implies [2] - 13:9, 46:14 importance [3] - 11:16, 12:17, 46:21 important [10] - 10:14, 11:20, 12:6, 12:12, 12:14, 36:21, 37:8, 50:13, 90:24, 97:25 impossible [1] - 102:22 impression [3] - 11:1, 57:13, 57:20 improper [2] - 8:11, 9:5 improve [3] - 38:5, 96:23, 97:1 improvement [1] - 97:2 IN [1] - 1:2 in-depth [1] - 10:3 inadvertently [1] - 4:7 Inc [1] - 15:7				
			J		
			JAMES [1] - 1:11 Janet [1] - 59:13 January [7] - 66:10, 68:15, 68:16, 82:16,		

<p>110:14, 112:18, 115:18, 115:20, 117:3, 119:8, 127:20, 132:10, 133:13, 134:17, 142:1, 142:3, 142:7, 146:13, 146:18, 146:22, 146:23, 149:15, 164:4, 167:14, 167:15, 167:23, 168:2, 168:3, 168:18, 169:21</p> <p>justification [4] - 36:8, 58:12, 58:19, 58:22</p> <p>justify [7] - 27:7, 27:11, 27:16, 36:6, 57:1, 83:10, 83:13</p>	<p>149:22, 152:9</p> <p>knowing [1] - 81:22</p> <p>knowledge [7] - 40:8, 78:19, 114:10, 115:12, 126:20, 127:10, 154:25</p> <p>knowledgeable [1] - 151:9</p> <p>known [3] - 26:19, 61:16, 148:22</p>	<p>112:7, 113:23, 125:20, 132:25, 133:14, 134:6, 138:13, 151:20, 158:17</p> <p>leave [1] - 136:9</p> <p>lectern [4] - 104:18, 116:9, 116:10, 116:11</p> <p>LEE [13] - 2:7, 2:8, 118:16, 123:5, 124:18, 124:23, 139:13, 143:15, 145:25, 146:2, 146:10, 146:11, 147:7</p> <p>Lee [2] - 1:19, 4:12</p> <p>Left [1] - 69:5</p> <p>left [9] - 44:11, 44:16, 69:7, 69:8, 75:8, 80:17, 113:21, 139:21, 149:22</p> <p>leg [1] - 31:22</p> <p>legitimate [24] - 10:22, 14:5, 25:2, 34:5, 37:5, 41:7, 44:23, 48:23, 49:25, 51:19, 53:12, 53:16, 60:25, 61:8, 86:21, 87:11, 105:19, 108:1, 108:5, 110:3, 110:16, 110:21, 170:22, 172:9</p> <p>legs [4] - 69:8, 69:20, 119:20, 119:22</p> <p>length [1] - 169:7</p> <p>leniency [1] - 169:1</p> <p>LENNIE [2] - 2:9, 148:7</p> <p>Lennie [3] - 115:3, 147:17, 148:13</p> <p>Lenore [1] - 49:11</p> <p>Leon [3] - 117:8, 124:14, 125:1</p> <p>less [1] - 97:13</p> <p>letter [2] - 19:13, 32:3</p> <p>letting [2] - 77:6, 77:14</p> <p>level [4] - 36:7, 57:14, 58:13, 89:7</p> <p>license [7] - 8:16, 19:11, 65:8, 105:23, 106:13, 106:14, 108:18</p> <p>licensed [1] - 107:6</p> <p>lieu [1] - 93:16</p> <p>life [8] - 96:21, 96:25, 97:1, 140:9, 144:14, 153:5, 153:10, 153:12</p> <p>lift [1] - 96:24</p> <p>limit [1] - 91:10</p> <p>limited [1] - 79:19</p>	<p>line [5] - 20:21, 21:6, 44:9, 92:3, 146:20</p> <p>lines [2] - 49:17, 142:10</p> <p>list [3] - 34:19, 120:3, 151:13</p> <p>listed [7] - 29:8, 67:8, 91:25, 95:25, 96:3, 96:6, 96:11</p> <p>listen [2] - 151:25, 168:14</p> <p>listened [1] - 152:6</p> <p>lists [1] - 85:24</p> <p>live [14] - 5:24, 5:25, 12:1, 96:20, 117:7, 124:10, 124:12, 124:14, 125:7, 148:16, 154:13, 157:7, 157:11, 157:16</p> <p>lived [5] - 124:14, 125:14, 148:18, 154:10, 154:11</p> <p>lives [1] - 164:16</p> <p>living [1] - 153:4</p> <p>LK [1] - 81:10</p> <p>LK-5 [1] - 80:13</p> <p>loan [1] - 129:11</p> <p>loaned [4] - 140:21, 140:24, 146:5, 146:21</p> <p>loaning [2] - 141:11, 142:21</p> <p>local [1] - 159:3</p> <p>locally [1] - 145:8</p> <p>locate [1] - 19:22</p> <p>locator [1] - 19:17</p> <p>logical [1] - 14:4</p> <p>long-term [5] - 30:4, 39:16, 65:19, 93:15, 93:21</p> <p>look [26] - 25:15, 29:12, 41:17, 41:18, 41:23, 42:23, 52:21, 57:3, 57:12, 62:12, 66:11, 66:18, 67:16, 69:16, 70:9, 76:7, 77:23, 78:7, 78:8, 84:6, 91:13, 101:4, 119:21, 170:16, 172:21</p> <p>looked [8] - 26:4, 26:6, 57:25, 67:20, 67:21, 80:23, 95:10, 101:17</p> <p>looking [10] - 36:5, 37:14, 53:4, 56:23, 58:4, 63:11, 76:9, 78:11, 87:3, 133:10</p> <p>looks [8] - 18:22, 20:4, 21:4, 27:15, 31:15, 68:22, 94:11,</p>	<p>97:24</p> <p>loose [1] - 140:4</p> <p>Lora [1] - 80:12</p> <p>Lortabs [1] - 150:23</p> <p>lost [3] - 77:15, 77:16, 119:19</p> <p>loud [1] - 142:11</p> <p>low [6] - 69:4, 69:8, 69:18, 69:20, 70:1, 150:11</p> <p>lower [2] - 101:23, 149:20</p> <p>Lubbock [1] - 6:13</p> <p>luck [1] - 156:10</p> <p>lunch [2] - 113:21, 170:8</p> <p>luncheon [2] - 87:15, 87:20</p> <p>lungs [1] - 152:6</p>
<p>K</p>	<p>L</p>		<p>M</p>	
<p>keep [14] - 11:14, 11:15, 12:12, 19:19, 25:11, 30:13, 32:19, 35:3, 43:18, 47:24, 49:7, 52:1, 122:6, 150:6</p> <p>keeping [1] - 12:17</p> <p>Kentucky [1] - 65:9</p> <p>kept [5] - 45:3, 45:25, 139:6, 160:22, 160:23</p> <p>Kessinger [1] - 127:18</p> <p>ketamine [3] - 126:10, 126:12, 126:13</p> <p>key [4] - 96:19, 97:23, 111:22, 111:24</p> <p>Kicklighter [1] - 80:12</p> <p>kidnapped [1] - 141:21</p> <p>kidney [7] - 79:14, 79:18, 79:19, 101:19, 101:23, 102:6, 102:7</p> <p>kids [1] - 129:11</p> <p>kind [24] - 11:1, 22:22, 36:13, 44:15, 44:19, 44:21, 66:18, 68:22, 70:16, 77:9, 77:18, 89:8, 97:15, 112:2, 135:19, 150:2, 152:4, 152:20, 154:22, 155:2, 164:24, 165:20, 166:21</p> <p>kinds [4] - 8:21, 108:4, 112:4, 160:17</p> <p>knee [5] - 119:11, 119:12, 149:21,</p>	<p>lab [6] - 29:2, 42:2, 42:14, 60:3, 63:12, 76:6</p> <p>lack [2] - 11:4, 11:8</p> <p>lacked [1] - 11:12</p> <p>ladies [10] - 3:2, 4:2, 50:6, 71:6, 87:14, 104:12, 115:21, 155:19, 164:1, 168:4</p> <p>lady [4] - 113:16, 113:17, 146:24, 166:23</p> <p>language [3] - 90:15, 91:5, 171:24</p> <p>Larry [9] - 125:14, 126:2, 128:21, 131:5, 140:19, 141:5, 144:17, 145:10, 146:8</p> <p>Larry's [2] - 147:2, 147:4</p> <p>last [24] - 24:6, 24:23, 29:18, 29:21, 43:2, 64:24, 70:23, 77:7, 77:15, 77:21, 78:10, 117:5, 122:1, 122:8, 130:6, 131:13, 137:6, 139:17, 148:14, 156:10, 156:11, 165:2, 166:19</p> <p>Last [1] - 68:24</p> <p>late [1] - 68:16</p> <p>latest [1] - 76:10</p> <p>Law [1] - 1:23</p> <p>law [8] - 106:8, 106:10, 107:16, 141:19, 168:20, 169:18, 169:25, 170:24</p> <p>lawfully [1] - 109:5</p> <p>lay [1] - 123:23</p> <p>laying [2] - 146:8, 153:11</p> <p>lays [1] - 121:5</p> <p>leads [1] - 14:4</p> <p>least [16] - 7:2, 28:10, 43:9, 63:5, 73:2, 106:22, 107:18,</p>	<p>leg [1] - 31:22</p> <p>legitimate [24] - 10:22, 14:5, 25:2, 34:5, 37:5, 41:7, 44:23, 48:23, 49:25, 51:19, 53:12, 53:16, 60:25, 61:8, 86:21, 87:11, 105:19, 108:1, 108:5, 110:3, 110:16, 110:21, 170:22, 172:9</p> <p>legs [4] - 69:8, 69:20, 119:20, 119:22</p> <p>length [1] - 169:7</p> <p>leniency [1] - 169:1</p> <p>LENNIE [2] - 2:9, 148:7</p> <p>Lennie [3] - 115:3, 147:17, 148:13</p> <p>Lenore [1] - 49:11</p> <p>Leon [3] - 117:8, 124:14, 125:1</p> <p>less [1] - 97:13</p> <p>letter [2] - 19:13, 32:3</p> <p>letting [2] - 77:6, 77:14</p> <p>level [4] - 36:7, 57:14, 58:13, 89:7</p> <p>license [7] - 8:16, 19:11, 65:8, 105:23, 106:13, 106:14, 108:18</p> <p>licensed [1] - 107:6</p> <p>lieu [1] - 93:16</p> <p>life [8] - 96:21, 96:25, 97:1, 140:9, 144:14, 153:5, 153:10, 153:12</p> <p>lift [1] - 96:24</p> <p>limit [1] - 91:10</p> <p>limited [1] - 79:19</p>	<p>line [5] - 20:21, 21:6, 44:9, 92:3, 146:20</p> <p>lines [2] - 49:17, 142:10</p> <p>list [3] - 34:19, 120:3, 151:13</p> <p>listed [7] - 29:8, 67:8, 91:25, 95:25, 96:3, 96:6, 96:11</p> <p>listen [2] - 151:25, 168:14</p> <p>listened [1] - 152:6</p> <p>lists [1] - 85:24</p> <p>live [14] - 5:24, 5:25, 12:1, 96:20, 117:7, 124:10, 124:12, 124:14, 125:7, 148:16, 154:13, 157:7, 157:11, 157:16</p> <p>lived [5] - 124:14, 125:14, 148:18, 154:10, 154:11</p> <p>lives [1] - 164:16</p> <p>living [1] - 153:4</p> <p>LK [1] - 81:10</p> <p>LK-5 [1] - 80:13</p> <p>loan [1] - 129:11</p> <p>loaned [4] - 140:21, 140:24, 146:5, 146:21</p> <p>loaning [2] - 141:11, 142:21</p> <p>local [1] - 159:3</p> <p>locally [1] - 145:8</p> <p>locate [1] - 19:22</p> <p>locator [1] - 19:17</p> <p>logical [1] - 14:4</p> <p>long-term [5] - 30:4, 39:16, 65:19, 93:15, 93:21</p> <p>look [26] - 25:15, 29:12, 41:17, 41:18, 41:23, 42:23, 52:21, 57:3, 57:12, 62:12, 66:11, 66:18, 67:16, 69:16, 70:9, 76:7, 77:23, 78:7, 78:8, 84:6, 91:13, 101:4, 119:21, 170:16, 172:21</p> <p>looked [8] - 26:4, 26:6, 57:25, 67:20, 67:21, 80:23, 95:10, 101:17</p> <p>looking [10] - 36:5, 37:14, 53:4, 56:23, 58:4, 63:11, 76:9, 78:11, 87:3, 133:10</p> <p>looks [8] - 18:22, 20:4, 21:4, 27:15, 31:15, 68:22, 94:11,</p>	<p>ma'am [7] - 116:19, 124:24, 139:10, 139:14, 146:12, 147:15, 148:3</p> <p>Madam [1] - 104:1</p> <p>mail [3] - 33:19, 170:10, 172:19</p> <p>mailed [1] - 86:19</p> <p>mailing [1] - 32:22</p> <p>main [1] - 40:14</p> <p>Main [1] - 1:20</p> <p>maintain [2] - 7:4, 165:16</p> <p>maintained [1] - 12:7</p> <p>maintaining [1] - 113:8</p> <p>Maintenance [1] - 74:8</p> <p>man [2] - 65:15, 158:23</p> <p>manage [1] - 45:1</p> <p>Management [1] - 101:9</p> <p>management [8] - 6:18, 6:20, 7:9, 7:20, 9:22, 16:11, 71:2, 149:12</p> <p>Manassas [2] - 5:25, 9:7</p> <p>manipulated [1] - 98:25</p> <p>manner [1] - 109:13</p> <p>manufacturer [2] - 108:23, 109:11</p> <p>map [1] - 125:8</p> <p>March [7] - 32:25, 34:14, 43:1, 43:2, 48:17, 68:20, 82:17</p>

<p>mark ^[1] - 169:16</p> <p>marked ^[3] - 27:15, 103:24, 146:17</p> <p>MARKED ^[1] - 2:12</p> <p>markings ^[1] - 80:19</p> <p>marks ^[5] - 24:24, 39:17, 80:16, 80:18, 81:23</p> <p>Martinsville ^[2] - 124:15, 125:7</p> <p>mask ^[1] - 38:4</p> <p>match ^[1] - 27:4</p> <p>math ^[1] - 23:3</p> <p>matter ^[6] - 56:17, 113:13, 113:14, 115:2, 118:21, 161:8</p> <p>matters ^[1] - 99:12</p> <p>MAY ^[2] - 1:12, 4:9</p> <p>Maynard ^[2] - 2:14, 4:10</p> <p>mean ^[42] - 12:25, 20:7, 31:23, 39:6, 42:8, 49:16, 51:16, 55:11, 56:18, 56:24, 61:15, 65:13, 66:20, 69:10, 70:5, 72:20, 99:11, 105:25, 106:18, 106:20, 107:15, 108:2, 108:6, 109:22, 110:11, 111:9, 115:9, 119:3, 122:4, 122:11, 129:10, 131:13, 135:1, 135:5, 139:5, 141:9, 144:13, 154:17, 166:15, 167:6, 167:10, 172:13</p> <p>meaning ^[4] - 42:17, 46:14, 63:4, 66:21</p> <p>means ^[15] - 8:18, 20:24, 21:6, 24:13, 24:14, 35:18, 42:9, 44:9, 44:14, 73:1, 76:17, 86:5, 89:8, 96:7, 108:23</p> <p>meanwhile ^[1] - 45:7</p> <p>measured ^[1] - 97:2</p> <p>mechanism ^[1] - 109:12</p> <p>medical ^[53] - 6:1, 6:3, 6:5, 6:8, 10:23, 11:5, 11:9, 11:16, 11:25, 12:1, 12:20, 14:5, 15:24, 20:12, 20:19, 25:2, 27:22, 28:23, 29:1, 29:4, 29:5, 34:5, 36:16, 49:18, 49:25, 51:19, 53:12, 53:16, 60:25, 61:8, 74:2, 77:20,</p>	<p>86:22, 86:23, 87:11, 90:25, 98:9, 99:9, 99:13, 105:18, 108:1, 110:3, 110:15, 110:21, 110:22, 135:2, 135:19, 150:18, 151:3, 169:23, 170:1, 170:22, 170:23</p> <p>Medical ^[1] - 6:12</p> <p>medically ^[1] - 66:22</p> <p>medication ^[42] - 22:12, 28:15, 30:22, 36:1, 36:7, 43:8, 43:16, 44:17, 46:16, 46:19, 47:12, 63:3, 64:3, 66:4, 67:8, 73:1, 73:2, 73:11, 75:16, 90:14, 90:16, 91:5, 93:16, 93:25, 99:17, 106:23, 120:13, 122:5, 123:16, 123:17, 123:22, 132:4, 140:24, 141:12, 142:20, 143:21, 144:18, 145:1, 146:16, 146:22, 152:20, 153:10</p> <p>medication's ^[1] - 43:15</p> <p>medications ^[37] - 10:9, 10:11, 12:16, 12:23, 13:11, 22:5, 22:14, 36:16, 37:3, 43:10, 43:13, 44:16, 45:1, 45:2, 45:3, 45:5, 48:3, 49:3, 55:6, 55:20, 67:6, 68:11, 71:18, 73:7, 77:19, 78:21, 81:7, 82:5, 93:17, 125:17, 128:12, 134:20, 137:25, 139:3, 145:21</p> <p>Medicine ^[4] - 7:25, 8:4, 8:9, 8:11</p> <p>medicine ^[25] - 6:12, 6:14, 6:19, 6:21, 6:25, 7:3, 7:8, 9:16, 12:8, 14:3, 36:18, 36:23, 37:1, 37:11, 37:16, 87:1, 109:6, 109:7, 119:12, 119:13, 122:8, 137:9, 151:11, 151:14, 151:16</p> <p>medicines ^[1] - 121:2</p> <p>meds ^[2] - 39:25, 72:20</p> <p>member ^[1] - 8:18</p>	<p>members ^[1] - 149:15</p> <p>memorialize ^[1] - 11:17</p> <p>memorialized ^[1] - 93:10</p> <p>memory ^[1] - 132:4</p> <p>mental ^[1] - 29:7</p> <p>mentioned ^[4] - 136:18, 155:15, 162:25, 166:18</p> <p>mess ^[1] - 150:10</p> <p>message ^[2] - 85:20, 113:22</p> <p>messages ^[3] - 2:14, 4:12, 113:22</p> <p>messed ^[1] - 149:19</p> <p>messing ^[1] - 132:3</p> <p>met ^[1] - 104:25</p> <p>metabolites ^[1] - 76:20</p> <p>methadone ^[3] - 30:23, 68:2, 68:5</p> <p>methods ^[1] - 98:14</p> <p>microphone ^[3] - 5:18, 116:10, 116:11</p> <p>midback ^[1] - 54:18</p> <p>might ^[6] - 24:17, 24:18, 53:5, 81:25, 90:8, 97:13</p> <p>migraines ^[1] - 126:18</p> <p>Mike's ^[7] - 132:21, 133:6, 133:14, 145:10, 160:7, 162:17, 162:18</p> <p>Mild ^[1] - 57:13</p> <p>miles ^[1] - 157:19</p> <p>military ^[2] - 130:22, 131:11</p> <p>milli ^[1] - 22:14</p> <p>milli-equivalents ^[1] - 22:14</p> <p>milligram ^[3] - 22:2, 22:6, 22:8</p> <p>milligrams ^[33] - 20:24, 21:12, 21:13, 21:20, 22:6, 22:20, 22:24, 22:25, 23:1, 23:13, 23:14, 23:15, 25:17, 25:18, 26:3, 35:19, 37:23, 55:3, 55:4, 55:5, 55:10, 55:13, 55:15, 68:12, 68:13, 82:7, 82:9, 120:15, 124:4, 124:5, 139:15</p> <p>Millwood ^[1] - 125:15</p> <p>mind ^[4] - 16:2,</p>	<p>63:20, 73:6, 102:20</p> <p>mine ^[6] - 147:2, 150:4, 150:12, 150:14, 162:12, 162:14</p> <p>mining ^[2] - 150:3, 150:5</p> <p>minor ^[1] - 169:15</p> <p>minute ^[4] - 18:3, 49:8, 91:13, 151:2</p> <p>Miss ^[1] - 146:4</p> <p>misuse ^[1] - 70:17</p> <p>mixed ^[1] - 112:3</p> <p>moderate ^[2] - 35:17, 76:25</p> <p>mom ^[3] - 44:9, 44:11, 44:15</p> <p>moment ^[6] - 103:14, 110:5, 123:1, 146:10, 163:12, 168:19</p> <p>MONDAY ^[1] - 1:12</p> <p>money ^[14] - 61:5, 61:20, 89:20, 92:21, 129:11, 131:6, 140:21, 140:22, 141:14, 142:15, 142:16, 143:11, 143:13, 159:18</p> <p>monitored ^[1] - 12:22</p> <p>month ^[18] - 8:23, 8:25, 35:18, 35:25, 42:16, 42:17, 47:5, 54:16, 62:14, 64:23, 69:2, 69:15, 73:16, 78:3, 131:22, 161:2, 167:8</p> <p>month's ^[1] - 43:15</p> <p>monthly ^[2] - 131:10, 131:15</p> <p>months ^[8] - 31:2, 75:14, 75:19, 76:2, 76:7, 85:11, 120:8</p> <p>Moore ^[4] - 113:17, 164:16, 166:25, 167:2</p> <p>morning ^[4] - 3:2, 4:2, 5:21, 168:11</p> <p>morphine ^[10] - 22:6, 22:8, 22:11, 22:15, 25:22, 37:23, 52:13, 55:3, 67:15, 162:5</p> <p>morphone ^[1] - 162:5</p> <p>most ^[7] - 9:5, 17:15, 27:4, 77:4, 118:3, 125:13, 129:13</p> <p>mother ^[7] - 119:18, 140:23, 140:24, 141:23, 142:19, 142:20, 142:21</p>	<p>motion ^[6] - 3:22, 104:21, 105:6, 112:15, 112:21, 113:10</p> <p>Mountain ^[1] - 32:6</p> <p>move ^[18] - 4:6, 4:10, 4:14, 12:3, 14:23, 18:1, 19:16, 25:6, 30:21, 35:7, 51:6, 54:5, 79:23, 83:5, 104:17, 105:6, 106:3, 106:6</p> <p>moved ^[1] - 76:24</p> <p>moving ^[5] - 30:13, 97:18, 144:5, 160:22, 160:23</p> <p>MR ^[374] - 2:3, 2:4, 2:7, 2:7, 2:8, 2:8, 2:9, 2:10, 3:4, 3:7, 3:11, 3:13, 4:5, 4:18, 4:23, 5:11, 5:23, 7:18, 9:14, 9:19, 9:21, 13:14, 13:17, 14:14, 14:21, 15:1, 15:6, 15:12, 15:16, 15:25, 16:5, 16:9, 16:10, 16:20, 16:22, 17:4, 17:9, 17:23, 18:4, 18:10, 18:14, 18:19, 18:20, 18:24, 19:8, 19:11, 19:12, 19:16, 20:5, 20:14, 20:17, 21:7, 21:11, 21:16, 21:23, 22:1, 23:6, 23:7, 23:22, 24:7, 24:18, 24:21, 25:6, 25:11, 25:14, 26:13, 26:19, 26:21, 27:25, 28:7, 28:12, 28:19, 29:9, 29:22, 29:23, 30:2, 30:3, 30:9, 30:13, 30:24, 31:5, 31:10, 31:14, 31:25, 32:15, 32:20, 32:24, 33:13, 33:17, 33:24, 34:8, 34:16, 34:25, 35:12, 35:14, 38:8, 38:14, 38:17, 38:20, 38:24, 39:1, 39:15, 39:19, 39:22, 39:24, 40:3, 40:4, 40:18, 40:20, 41:2, 41:3, 41:13, 41:16, 41:24, 42:1, 42:11, 42:13, 43:20, 43:22, 45:14, 45:23, 46:5, 46:7, 47:20, 48:2, 48:14, 48:15, 48:20, 48:21, 49:6, 49:10, 49:20, 49:22, 50:12, 50:19, 50:25,</p>
--	---	---	--	---

<p>51:5, 51:8, 51:22, 52:4, 53:2, 53:6, 54:5, 54:8, 55:18, 55:19, 56:13, 56:16, 57:16, 57:18, 58:14, 58:17, 58:23, 58:24, 59:13, 59:17, 59:23, 60:7, 60:16, 60:22, 61:10, 61:17, 61:18, 62:9, 62:11, 63:6, 63:10, 63:15, 63:24, 64:7, 64:17, 64:21, 65:1, 65:4, 65:7, 65:17, 65:18, 66:1, 66:3, 66:13, 66:14, 66:23, 67:1, 67:16, 67:18, 67:23, 68:1, 68:17, 68:19, 70:19, 70:21, 70:23, 71:4, 71:11, 71:17, 71:23, 71:24, 72:3, 72:9, 72:17, 72:18, 73:8, 73:10, 73:13, 73:15, 73:18, 74:1, 74:5, 74:7, 74:11, 74:12, 74:17, 74:19, 75:9, 75:21, 76:12, 76:16, 78:22, 78:23, 79:9, 79:13, 79:23, 80:2, 80:12, 80:15, 81:10, 81:11, 82:12, 82:14, 83:16, 83:18, 84:6, 84:10, 84:16, 84:17, 84:21, 85:1, 85:15, 85:18, 86:2, 86:3, 86:9, 86:13, 86:15, 87:6, 87:7, 87:13, 87:25, 88:5, 88:7, 92:12, 92:13, 94:4, 94:6, 98:17, 98:18, 98:19, 103:14, 103:18, 103:20, 103:23, 104:3, 104:7, 104:11, 104:16, 104:19, 105:11, 105:20, 106:1, 106:6, 106:12, 106:18, 106:24, 107:4, 107:24, 108:9, 108:13, 108:15, 108:17, 108:22, 109:2, 109:8, 109:16, 109:20, 110:5, 110:18, 110:24, 111:2, 111:13, 111:18, 111:21, 113:3, 113:13, 114:3, 114:8, 114:15, 114:20, 114:24, 114:25, 115:2, 115:9, 115:14, 115:17, 115:25, 116:3, 116:5,</p>	<p>117:2, 118:16, 118:22, 123:1, 123:5, 124:18, 124:23, 139:13, 143:15, 143:17, 143:19, 145:23, 145:25, 146:2, 146:10, 146:11, 147:7, 147:9, 147:17, 148:6, 148:11, 151:6, 152:3, 154:18, 154:24, 155:5, 155:10, 155:17, 155:24, 156:2, 156:4, 156:16, 156:18, 163:12, 163:14, 163:16, 163:18, 163:19, 163:23, 164:6, 164:10, 164:15, 165:2, 165:8, 165:10, 165:13, 165:24, 166:5, 166:12, 166:17, 166:25, 167:2, 167:18, 168:1, 169:22, 170:7, 170:15, 170:18, 170:20, 171:3, 171:7, 171:9, 171:16, 171:19, 171:22, 172:3, 172:6, 172:11 MRI [10] - 56:15, 56:18, 56:21, 56:22, 57:12, 57:24, 58:5, 58:8, 68:24, 95:5 MRIs [7] - 57:22, 58:2, 83:7, 83:13, 89:14, 150:17, 150:20 MS [10] - 21:19, 24:11, 25:17, 25:22, 26:2, 26:8, 28:17, 34:1, 67:14, 109:24 multi [1] - 57:14 multi-level [1] - 57:14 must [2] - 74:20, 170:8</p>	<p>28:15, 36:1, 44:25, 70:18, 81:6 narcotics [20] - 13:1, 21:22, 22:7, 27:12, 28:18, 38:1, 38:5, 38:15, 38:21, 58:13, 58:22, 65:16, 70:8, 70:13, 72:23, 79:21, 80:5, 80:7, 80:21, 85:10 nature [3] - 13:9, 94:24, 97:17 nausea [1] - 24:12 near [2] - 125:2, 125:4 necessarily [2] - 56:20, 165:19 necessary [3] - 27:22, 95:6, 95:7 necessity [1] - 12:20 neck [5] - 27:17, 54:18, 149:19, 150:10, 150:20 need [15] - 5:13, 12:4, 37:11, 37:12, 63:19, 81:5, 87:20, 95:11, 95:13, 97:10, 104:9, 138:22, 167:10, 167:25, 172:22 needed [5] - 20:10, 46:17, 47:18, 111:12, 139:2 needing [1] - 164:25 needs [9] - 8:15, 30:20, 31:21, 36:1, 47:19, 99:8, 100:14, 110:24, 119:11 negative [21] - 42:15, 43:5, 45:25, 46:2, 46:9, 46:14, 46:15, 46:16, 46:21, 48:12, 52:13, 56:8, 62:16, 62:23, 63:25, 64:2, 71:25, 72:20, 72:21, 102:16 Neil [2] - 79:25, 80:3 nephew [2] - 140:22, 142:24 neurologist [1] - 69:7 Neurontin [2] - 26:19, 55:21 never [5] - 100:6, 103:10, 124:3, 136:6, 136:11 New [6] - 6:11, 16:11, 32:12, 67:16, 101:8 new [4] - 69:2, 69:15,</p>	<p>168:21, 169:3 news [1] - 168:14 next [65] - 3:7, 4:4, 16:9, 16:20, 17:4, 20:14, 21:7, 25:21, 26:7, 29:22, 30:2, 30:9, 31:5, 31:12, 31:13, 31:25, 32:2, 33:2, 33:3, 33:4, 33:5, 33:12, 33:17, 34:8, 38:17, 39:15, 41:2, 41:14, 42:16, 42:17, 45:19, 45:20, 46:13, 48:20, 51:22, 51:24, 51:25, 52:7, 57:16, 57:17, 60:5, 62:21, 63:20, 63:21, 64:23, 72:3, 72:4, 72:5, 73:16, 73:22, 73:23, 73:24, 75:24, 76:10, 84:8, 84:21, 84:22, 86:13, 94:12, 116:9, 122:9, 147:16, 169:8 Next [1] - 26:13 night [4] - 24:23, 154:16, 165:2, 166:19 NJ-15 [1] - 79:25 nobody [2] - 58:3, 58:4 non [7] - 28:8, 36:16, 40:5, 70:10, 70:12, 108:14, 108:15 non-controlled [5] - 28:8, 70:10, 70:12, 108:14, 108:15 non-medical [1] - 36:16 non-RXD [1] - 40:5 none [4] - 73:1, 160:17, 160:18, 172:3 normal [2] - 58:10, 153:4 normally [2] - 11:8, 11:12 noroxycodone [1] - 42:7 North [1] - 6:10 nortriptyline [1] - 26:16 notation [4] - 47:17, 68:24, 69:5, 77:10 note [16] - 33:20, 41:4, 46:13, 52:15, 67:10, 69:2, 69:7, 72:7, 73:13, 76:4, 77:9, 78:5, 78:24, 79:11, 101:15, 101:19 noted [1] - 56:8 notes [3] - 32:1, 44:6, 101:18</p>	<p>nothing [14] - 5:4, 26:14, 30:8, 39:21, 50:20, 56:21, 56:24, 65:22, 69:23, 70:2, 102:13, 116:17, 141:9, 148:2 notice [3] - 2:15, 13:5, 49:12 notified [1] - 29:3 November [23] - 18:8, 18:16, 18:18, 40:1, 45:17, 45:18, 46:1, 54:22, 55:1, 59:9, 62:22, 66:7, 66:8, 68:15, 77:24, 80:11, 81:9, 81:12, 81:16, 81:19, 117:15, 138:4, 140:3 number [4] - 33:21, 46:19, 60:19, 122:17 Number [3] - 68:23, 69:4, 74:18 numbers [3] - 91:25, 92:5, 132:5 numbness [1] - 69:8 numerous [1] - 134:10 nurse [2] - 26:25, 27:14 nutrition [1] - 107:10 nutritional [1] - 109:21</p>
O				
<p>object [4] - 13:14, 61:10, 70:23, 86:9 objection [12] - 9:18, 13:16, 61:12, 71:1, 86:11, 98:17, 118:16, 118:19, 154:24, 155:17, 170:19, 172:7 objections [2] - 169:21, 172:6 objective [1] - 83:12 observe [2] - 97:18, 98:2 obtain [1] - 74:20 obtained [2] - 109:6 obviously [4] - 102:6, 115:13, 162:25, 167:7 OC [3] - 41:5, 66:4, 75:13 OC-IR [3] - 41:5, 66:4, 75:13 occasion [3] - 106:22, 138:7, 138:13 occasions [2] - 132:25, 135:18</p>				

<p>occurred [1] - 137:11</p> <p>October [20] - 20:3, 21:17, 22:16, 24:2, 24:5, 26:1, 30:6, 33:12, 39:18, 42:18, 42:23, 52:12, 52:22, 55:9, 68:9, 68:10, 68:15, 74:13, 80:11, 149:5</p> <p>OF [4] - 1:3, 1:5, 1:11, 2:13</p> <p>offer [3] - 53:20, 53:21, 172:2</p> <p>offered [1] - 92:18</p> <p>office [12] - 61:6, 61:21, 106:22, 109:7, 120:23, 121:20, 130:14, 131:4, 132:11, 140:10, 158:7, 159:12</p> <p>Office [3] - 1:20, 1:23, 126:23</p> <p>offices [1] - 12:5</p> <p>often [8] - 10:12, 12:2, 34:20, 45:13, 92:19, 92:25, 99:13, 134:14</p> <p>old [5] - 52:6, 52:18, 65:10, 143:1, 143:5</p> <p>ON [1] - 2:13</p> <p>once [7] - 133:9, 134:1, 134:18, 137:5, 138:10, 166:1</p> <p>one [90] - 3:4, 10:9, 11:14, 13:10, 15:4, 19:22, 20:3, 20:9, 26:6, 26:7, 28:15, 30:10, 31:6, 33:11, 33:12, 34:22, 39:23, 40:14, 40:21, 43:23, 45:21, 47:7, 47:25, 48:1, 48:9, 49:9, 57:19, 59:16, 63:3, 64:11, 66:16, 73:20, 73:21, 74:20, 75:4, 75:17, 78:6, 83:16, 84:23, 85:20, 87:9, 87:16, 87:21, 91:17, 94:9, 95:17, 95:22, 95:25, 96:3, 96:22, 101:14, 101:17, 111:21, 112:25, 113:13, 115:2, 122:1, 126:7, 132:1, 132:2, 133:1, 133:12, 133:16, 134:1, 134:15, 137:9, 137:25, 138:7, 138:13, 140:20,</p>	<p>140:21, 143:6, 146:10, 149:9, 149:13, 150:21, 151:14, 154:6, 156:22, 158:8, 158:9, 158:10, 158:11, 165:13, 168:25</p> <p>one's [4] - 78:17</p> <p>one-page [1] - 91:17</p> <p>ones [3] - 50:13, 139:8, 151:10</p> <p>ongoing [3] - 7:4, 79:20, 81:7</p> <p>OP [2] - 35:18, 72:10</p> <p>OP-ER [2] - 35:18, 72:10</p> <p>Opana [9] - 32:25, 35:18, 54:9, 82:16, 82:20, 85:9, 133:17, 137:21, 138:3</p> <p>Opanas [3] - 120:18, 121:1, 121:25</p> <p>open [1] - 127:12</p> <p>opened [2] - 158:1, 158:5</p> <p>operate [1] - 140:4</p> <p>operating [1] - 111:4</p> <p>opiate [5] - 22:4, 36:15, 45:8, 74:21, 90:15</p> <p>opiates [4] - 36:9, 38:1, 68:7, 83:14</p> <p>opine [1] - 72:13</p> <p>opinion [25] - 10:21, 13:20, 13:23, 14:2, 14:7, 17:13, 34:4, 36:3, 48:22, 51:21, 53:24, 60:23, 61:4, 61:23, 61:25, 62:7, 71:2, 77:18, 78:9, 85:19, 86:5, 86:20, 87:3, 87:9, 161:8</p> <p>opioid [5] - 30:4, 39:16, 44:21, 65:19, 90:13</p> <p>Opioid [2] - 74:8, 90:10</p> <p>opportunity [3] - 115:23, 167:4, 171:23</p> <p>opposing [1] - 172:20</p> <p>opposite [2] - 44:22, 54:25</p> <p>options [6] - 10:10, 12:21, 43:6, 43:7, 96:3, 106:19</p> <p>or [5] - 170:23, 171:10, 171:14, 171:15, 172:10</p> <p>or.. [1] - 162:17</p>	<p>order [4] - 6:25, 76:6, 109:11, 112:8</p> <p>ordered [2] - 75:17, 75:18</p> <p>Organization [2] - 88:24, 89:1</p> <p>organization [1] - 89:2</p> <p>original [3] - 63:19, 63:23, 72:11</p> <p>originally [1] - 124:5</p> <p>ortho [1] - 69:3</p> <p>orthopedic [2] - 69:17, 69:25</p> <p>osteoarthritis [1] - 34:23</p> <p>otherwise [2] - 35:10, 112:21</p> <p>ought [1] - 116:9</p> <p>outcome [2] - 30:7, 30:8</p> <p>outcomes [2] - 39:20, 39:21</p> <p>outside [7] - 14:7, 25:3, 87:10, 110:20, 111:14, 113:6, 116:2</p> <p>overall [1] - 38:6</p> <p>overnight [2] - 125:25, 130:25</p> <p>overrule [5] - 13:16, 61:12, 70:25, 86:11, 118:19</p> <p>owe [2] - 142:16, 143:11</p> <p>owed [3] - 140:22, 142:15, 143:13</p> <p>own [2] - 17:18, 93:12</p> <p>owner [1] - 133:20</p> <p>oxazepam [1] - 40:22</p> <p>oxy [1] - 139:7</p> <p>oxycodone [80] - 21:13, 21:20, 22:24, 23:4, 23:9, 23:15, 25:17, 26:5, 28:17, 32:25, 34:1, 41:20, 42:5, 42:6, 42:10, 42:15, 42:16, 42:20, 42:25, 45:25, 46:1, 46:2, 46:9, 47:4, 52:13, 55:4, 55:21, 56:5, 56:7, 59:11, 60:8, 62:14, 62:16, 62:23, 62:24, 63:1, 63:12, 64:1, 66:6, 66:9, 66:10, 67:6, 67:14, 67:15, 68:12, 71:19, 71:25, 72:22, 72:23, 78:3, 78:15,</p>	<p>80:10, 82:9, 82:18, 83:2, 83:23, 85:8, 85:9, 107:8, 109:23, 124:1, 124:3, 126:10, 139:14, 139:15, 139:16, 139:20, 141:22, 142:4, 143:7, 146:3, 152:22, 160:24, 162:4</p> <p>oxycodones [1] - 120:12</p> <p>OxyContin [13] - 20:24, 21:11, 22:2, 22:21, 26:2, 26:8, 34:1, 41:5, 66:11, 109:24, 124:6, 142:17, 146:24</p> <p>oxymorphone [36] - 34:2, 41:21, 55:5, 55:10, 55:13, 55:15, 55:21, 56:5, 59:11, 62:18, 62:22, 63:12, 66:9, 66:10, 68:13, 72:1, 72:22, 72:24, 78:3, 80:10, 82:7, 82:16, 82:20, 83:24, 85:8, 107:9, 120:25, 121:25, 137:19, 137:22, 138:3, 160:25, 162:4</p>	<p>19:18, 19:19, 19:20, 19:22, 20:14, 21:7, 21:9, 21:11, 21:23, 21:24, 23:6, 23:22, 23:24, 23:25, 24:1, 24:2, 24:4, 24:6, 26:13, 26:20, 26:22, 27:25, 28:14, 29:22, 30:2, 30:9, 31:12, 31:13, 32:1, 32:2, 32:3, 32:5, 32:21, 32:24, 33:2, 33:3, 33:4, 33:5, 33:20, 33:22, 34:10, 34:25, 35:4, 35:5, 35:6, 37:14, 38:8, 38:17, 38:18, 39:15, 39:16, 41:2, 41:14, 41:15, 43:21, 43:24, 45:14, 45:19, 45:20, 45:21, 46:5, 48:1, 48:20, 49:8, 49:9, 51:12, 51:23, 51:24, 51:25, 53:4, 54:6, 56:15, 57:8, 57:16, 57:17, 58:16, 58:23, 59:14, 60:5, 60:17, 62:10, 63:16, 63:17, 63:20, 63:21, 64:9, 64:10, 64:14, 64:15, 64:16, 64:22, 64:24, 66:2, 66:11, 67:24, 71:11, 71:13, 72:3, 72:4, 72:5, 72:7, 73:22, 73:23, 73:24, 74:6, 74:11, 74:17, 74:18, 75:24, 79:9, 79:10, 79:25, 82:24, 84:8, 84:21, 84:22, 85:16, 86:13, 91:17, 142:7, 146:20</p> <p>pages [3] - 16:4, 35:9, 146:18</p> <p>paid [9] - 103:1, 130:13, 131:5, 131:21, 132:16, 136:16, 140:22, 141:14</p> <p>pain [93] - 6:12, 6:14, 6:18, 6:20, 6:25, 7:3, 7:8, 7:9, 7:19, 9:16, 9:22, 12:25, 13:3, 16:11, 16:16, 19:21, 20:3, 22:3, 24:4, 24:12, 27:17, 30:15, 31:22, 35:17, 35:19, 35:25, 36:4, 36:18, 36:23, 37:1, 37:6, 37:7, 37:10, 37:11, 37:16, 37:17, 37:18, 37:19, 38:4, 39:6,</p>
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Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<p>39:13, 44:23, 44:24, 51:15, 53:19, 54:15, 54:16, 54:18, 58:18, 63:2, 68:23, 68:25, 69:8, 70:1, 70:7, 71:1, 72:24, 79:18, 79:21, 89:3, 89:5, 89:7, 92:15, 92:18, 93:17, 93:25, 95:4, 95:14, 95:15, 95:16, 95:17, 95:22, 96:22, 101:25, 102:3, 120:14, 124:8, 126:5, 126:13, 142:19, 144:11, 144:18, 149:9, 149:10, 149:12, 150:22, 151:15, 152:24, 155:15, 165:5</p> <p>Pain [14] - 17:7, 23:25, 26:22, 30:10, 31:6, 35:1, 39:2, 64:11, 66:11, 73:20, 91:17, 95:19, 95:21, 101:9</p> <p>Pam [2] - 72:10, 72:15</p> <p>Pamela [1] - 71:14</p> <p>panels [1] - 8:19</p> <p>paper [5] - 4:15, 37:14, 98:6, 121:13, 121:16</p> <p>papers [2] - 17:16, 66:20</p> <p>paperwork [1] - 76:23</p> <p>parking [1] - 4:16</p> <p>part [10] - 18:21, 23:24, 29:5, 32:8, 44:6, 59:15, 100:3, 105:13, 111:24, 114:5</p> <p>participate [1] - 8:22</p> <p>particular [3] - 6:6, 121:10, 151:11</p> <p>particularly [1] - 167:4</p> <p>parties [1] - 167:14</p> <p>parties' [1] - 172:16</p> <p>pass [1] - 121:20</p> <p>passed [4] - 7:3, 107:9, 146:9, 153:16</p> <p>passing [1] - 79:19</p> <p>past [4] - 54:16, 126:5, 149:20, 170:4</p> <p>patch [1] - 130:7</p> <p>pathology [1] - 53:18</p> <p>patient [116] - 2:13, 2:14, 10:1, 10:20, 11:2, 11:13, 12:22, 12:25, 13:3, 13:5, 17:12, 17:17, 17:19,</p>	<p>18:15, 18:22, 20:10, 20:11, 20:25, 22:15, 24:4, 24:10, 24:15, 26:10, 30:23, 31:22, 32:10, 35:16, 35:17, 35:23, 35:25, 36:3, 36:11, 36:12, 36:14, 36:18, 37:18, 39:10, 39:12, 39:25, 40:25, 43:8, 43:10, 43:13, 44:6, 46:19, 46:22, 48:24, 52:17, 53:20, 53:23, 53:25, 54:2, 54:9, 54:17, 54:23, 55:23, 59:18, 68:4, 68:22, 69:6, 69:13, 70:2, 72:14, 73:1, 73:16, 75:12, 76:11, 76:21, 76:24, 77:4, 77:6, 79:14, 79:18, 80:3, 81:3, 81:6, 85:13, 90:22, 95:4, 95:24, 96:4, 96:7, 96:8, 96:11, 97:8, 97:12, 97:15, 97:24, 98:1, 98:5, 98:9, 99:9, 100:7, 100:10, 100:12, 102:9, 102:17, 105:22, 106:15, 106:17, 108:19, 108:21, 111:12, 113:4, 117:12, 129:17, 148:24, 149:1, 161:20, 165:9, 169:13, 169:17, 169:24</p> <p>Patient [9] - 14:12, 16:6, 16:11, 31:11, 39:5, 67:10, 67:16, 76:3, 101:8</p> <p>patient's [20] - 10:4, 11:19, 16:25, 27:10, 27:21, 30:19, 30:20, 33:25, 36:6, 41:11, 49:4, 67:6, 69:11, 69:14, 70:7, 72:23, 80:20, 83:12, 91:21, 101:10</p> <p>patients [32] - 10:10, 11:22, 12:3, 12:14, 13:5, 17:16, 22:12, 43:4, 49:12, 53:22, 61:7, 61:22, 85:21, 89:23, 90:13, 92:14, 92:17, 93:1, 94:18, 97:3, 97:5, 97:11, 98:12, 99:1, 99:22, 100:17, 102:19, 106:23, 111:11, 120:16, 163:2, 165:14</p>	<p>patients' [1] - 61:21</p> <p>pattern [1] - 118:21</p> <p>Patty [2] - 161:13, 163:1</p> <p>pay [15] - 61:6, 61:21, 97:21, 131:4, 132:11, 132:14, 133:1, 134:22, 142:23, 159:12, 159:16, 159:22, 159:24, 160:3, 162:20</p> <p>paying [5] - 131:3, 131:6, 133:11, 134:25, 141:12</p> <p>payment [1] - 86:18</p> <p>PC [2] - 16:6, 16:12</p> <p>PCP [1] - 69:2</p> <p>Pennington [1] - 1:24</p> <p>people [20] - 9:8, 36:24, 37:15, 40:12, 43:11, 44:23, 45:6, 45:7, 61:24, 80:23, 83:11, 85:24, 86:6, 93:6, 93:8, 93:17, 149:10, 161:11, 162:24, 163:3</p> <p>people's [1] - 12:2</p> <p>per [14] - 8:23, 8:25, 20:24, 22:6, 22:15, 23:16, 23:17, 37:23, 42:24, 55:11, 55:15, 82:9, 86:6</p> <p>percent [1] - 99:2</p> <p>Percocet [4] - 22:23, 23:18</p> <p>Percocets [2] - 23:3, 128:3</p> <p>perfect [1] - 58:4</p> <p>perhaps [4] - 36:16, 37:2, 69:17, 116:8</p> <p>period [1] - 97:13</p> <p>periods [1] - 93:18</p> <p>permitting [1] - 168:12</p> <p>person [36] - 3:20, 10:7, 20:7, 27:15, 36:22, 36:23, 37:1, 37:4, 37:5, 37:7, 37:10, 39:9, 42:10, 44:15, 44:20, 45:4, 56:18, 63:2, 72:15, 79:6, 81:23, 81:25, 82:2, 82:10, 86:6, 98:6, 99:16, 102:15, 129:14, 135:23, 136:12, 139:17, 154:10, 156:25, 164:5, 165:18</p> <p>person's [3] - 58:3,</p>	<p>74:2, 93:11</p> <p>personal [2] - 115:12, 154:25</p> <p>personally [2] - 153:22, 154:22</p> <p>pertaining [1] - 29:6</p> <p>PH-1000 [1] - 71:15</p> <p>PH-12 [1] - 72:17</p> <p>PH-6 [1] - 71:16</p> <p>pharmacists [1] - 165:25</p> <p>pharmacy [13] - 74:20, 74:23, 75:5, 108:25, 109:9, 109:12, 120:3, 133:3, 145:10, 160:8, 160:9, 160:10, 160:13</p> <p>Pharmacy [4] - 2:16, 145:10, 160:7, 162:15</p> <p>phone [11] - 33:21, 121:19, 134:3, 134:23, 135:21, 136:10, 142:18, 163:24, 164:6, 166:7, 166:20</p> <p>phonetic [1] - 141:17</p> <p>Photo [1] - 2:15</p> <p>photograph [1] - 4:14</p> <p>physical [3] - 96:1, 152:4, 156:9</p> <p>physically [1] - 96:8</p> <p>physician [25] - 11:10, 11:13, 11:19, 11:21, 15:1, 17:18, 28:25, 35:22, 36:21, 53:18, 53:22, 53:25, 69:13, 69:15, 74:22, 75:19, 86:24, 90:23, 90:25, 91:11, 99:13, 105:16, 106:10, 107:17, 107:20</p> <p>physician's [1] - 97:4</p> <p>physicians [7] - 8:19, 9:3, 12:3, 29:8, 100:8, 106:21, 109:6</p> <p>picked [1] - 116:10</p> <p>picture [2] - 5:13, 56:22</p> <p>pictures [2] - 58:2, 58:9</p> <p>piece [2] - 4:15, 98:6</p> <p>pieces [1] - 4:6</p> <p>pill [10] - 22:22, 42:24, 55:11, 55:16, 98:20, 98:21, 109:23, 109:24, 144:22, 152:16</p> <p>pills [48] - 21:1, 23:9,</p>	<p>25:17, 25:18, 26:3, 47:5, 47:14, 47:17, 55:3, 55:4, 55:13, 68:12, 68:13, 91:3, 104:24, 105:14, 106:14, 106:16, 107:8, 107:9, 108:4, 108:11, 108:20, 109:3, 109:10, 111:8, 112:7, 133:8, 138:8, 138:14, 138:20, 138:23, 141:22, 142:4, 142:17, 143:12, 144:22, 146:3, 146:24, 150:22, 158:24, 159:1, 159:5, 160:25, 161:12, 161:16, 163:1</p> <p>pipes [1] - 150:11</p> <p>place [14] - 39:9, 53:17, 74:22, 79:8, 113:8, 129:7, 129:17, 129:22, 133:17, 150:15, 160:16, 162:13, 162:18, 165:16</p> <p>placed [1] - 112:3</p> <p>places [2] - 100:22, 157:18</p> <p>PLAINTIFF [1] - 2:13</p> <p>Plaintiff [1] - 1:6</p> <p>PLAINTIFFS [1] - 2:2</p> <p>plan [5] - 10:7, 11:11, 17:22, 27:24, 53:21</p> <p>planning [2] - 69:13, 120:11</p> <p>plans [1] - 37:12</p> <p>PLC [1] - 1:23</p> <p>Pleasant [1] - 128:3</p> <p>plus [1] - 163:10</p> <p>PMP [4] - 16:23, 17:5, 23:24, 100:21</p> <p>PMPs [1] - 53:11</p> <p>point [19] - 7:24, 13:18, 17:25, 18:1, 35:10, 40:9, 47:12, 48:16, 48:24, 50:17, 51:13, 53:8, 57:23, 100:9, 100:16, 109:17, 113:23, 136:25, 154:15</p> <p>Point [1] - 128:3</p> <p>pointed [2] - 101:15</p> <p>pointing [2] - 68:23, 69:4</p> <p>points [1] - 111:22</p> <p>pole [1] - 119:19</p> <p>poor [4] - 39:6, 77:6,</p>
---	---	---	--	---

<p>77:14, 100:2 pose [1] - 93:4 poses [1] - 93:5 position [2] - 165:12, 165:22 positive [18] - 40:8, 43:23, 45:16, 45:24, 52:6, 55:23, 56:9, 56:10, 58:25, 60:11, 62:18, 66:6, 67:7, 72:1, 76:20, 84:11, 84:15, 85:5 possess [4] - 104:22, 105:20, 106:11, 111:8 possession [13] - 80:4, 84:18, 85:6, 105:17, 107:17, 107:18, 107:19, 107:21, 109:7, 110:19, 111:7, 138:21, 171:12 possibility [2] - 110:17, 166:19 possible [11] - 11:23, 75:6, 75:8, 79:24, 89:11, 90:7, 93:20, 95:11, 95:13, 110:11, 168:6 possibly [2] - 54:17, 65:15 Post [4] - 79:11, 101:15, 101:18, 101:19 Post-it [4] - 79:11, 101:15, 101:18, 101:19 potential [1] - 59:21 potentially [1] - 165:17 practical [1] - 99:12 practically [2] - 58:3, 99:15 practice [38] - 9:3, 9:25, 10:2, 10:22, 11:21, 13:9, 13:12, 13:13, 13:24, 14:3, 14:8, 25:3, 34:5, 48:24, 50:1, 51:20, 53:13, 60:25, 62:6, 66:19, 75:4, 77:7, 86:22, 87:1, 87:10, 98:16, 105:18, 108:2, 110:3, 110:15, 110:20, 111:14, 111:16, 113:6, 137:16, 139:21, 158:1, 170:23 Practices [1] - 132:22</p>	<p>practicing [4] - 7:19, 7:23, 12:24, 126:19 practitioner [1] - 110:22 Pre [1] - 15:13 Pre-screening [1] - 15:13 preauthorization [1] - 34:21 predicated [1] - 41:10 preferable [1] - 114:20 premise [1] - 49:4 prepared [1] - 169:14 prescribe [11] - 68:9, 80:7, 81:22, 81:24, 82:4, 119:25, 120:2, 120:11, 120:13, 120:17, 152:21 prescribed [42] - 22:13, 22:15, 23:2, 23:15, 41:20, 42:5, 43:4, 43:24, 46:2, 46:11, 46:16, 47:4, 47:18, 54:10, 55:20, 56:1, 56:10, 59:4, 59:18, 60:8, 60:12, 60:13, 62:18, 62:25, 66:4, 67:6, 67:9, 70:10, 71:18, 72:23, 74:21, 75:16, 76:21, 80:10, 82:5, 82:9, 90:14, 91:7, 124:8, 139:18, 160:24, 169:12 prescribed [1] - 48:4 prescribes [3] - 68:11, 68:12, 169:24 prescribing [20] - 8:12, 9:4, 9:5, 9:16, 12:13, 12:18, 12:23, 13:11, 17:2, 27:11, 39:8, 40:15, 47:11, 64:3, 80:22, 81:6, 85:10, 120:9, 124:6, 127:1 prescription [57] - 20:18, 20:22, 21:9, 21:11, 24:11, 25:16, 26:3, 33:4, 35:16, 42:16, 43:3, 44:11, 46:25, 52:6, 55:15, 57:8, 58:13, 62:21, 62:24, 66:7, 68:16, 72:10, 77:7, 77:15, 77:16, 77:21, 78:6, 81:19, 85:7, 100:21,</p>	<p>107:23, 109:1, 109:3, 109:7, 109:9, 126:13, 136:1, 136:5, 138:3, 138:15, 138:17, 138:22, 138:23, 146:6, 147:3, 147:4, 154:23, 155:3, 156:20, 159:2, 160:18, 160:21, 165:14, 169:25, 170:13 prescriptions [66] - 9:23, 10:21, 13:22, 14:1, 14:5, 16:25, 17:1, 21:19, 25:1, 25:12, 29:18, 32:25, 33:2, 33:3, 33:5, 33:6, 33:7, 33:8, 33:9, 33:10, 34:1, 34:3, 48:6, 48:22, 49:24, 51:18, 52:21, 53:11, 54:1, 59:8, 60:24, 70:8, 70:14, 72:16, 74:21, 77:23, 78:15, 79:17, 83:14, 86:6, 86:18, 86:19, 86:20, 86:21, 87:9, 91:6, 111:10, 113:4, 125:11, 127:9, 132:14, 132:24, 133:14, 136:14, 137:23, 145:4, 159:10, 159:22, 159:24, 160:4, 162:11, 165:18, 166:13, 166:14, 172:21 presence [7] - 4:1, 42:6, 51:3, 72:25, 88:2, 115:20, 168:3 present [4] - 3:15, 115:7, 115:23, 167:25 presentation [1] - 11:19 presented [9] - 3:13, 110:11, 112:19, 112:23, 113:1, 113:3, 113:4, 113:5, 114:2 PRESIDING [1] - 1:11 pressure [2] - 135:9, 152:7 presumably [1] - 33:21 pretty [1] - 133:1 prevented [1] - 140:10 prevents [2] - 69:24, 70:2 previous [3] - 21:23,</p>	<p>74:17, 85:5 previously [6] - 24:22, 26:4, 26:6, 51:9, 57:24, 166:2 primarily [1] - 14:4 primary [1] - 69:15 prime [1] - 44:19 Priority [2] - 14:11, 33:15 PRN [1] - 46:14 probiotics [1] - 143:24 problem [22] - 11:11, 36:4, 36:23, 37:1, 37:6, 37:8, 37:10, 37:11, 37:19, 37:25, 39:10, 44:23, 44:24, 45:7, 45:8, 81:5, 81:8, 82:1, 152:18, 166:14, 167:11 problems [6] - 36:24, 37:16, 37:17, 126:4, 152:13, 155:11 proceed [7] - 3:3, 9:20, 104:6, 114:23, 115:24, 148:5, 167:13 Proceedings [16] - 1:25, 3:1, 4:1, 50:8, 50:22, 51:3, 87:18, 87:22, 88:2, 104:14, 115:20, 164:4, 164:11, 168:3, 168:18, 172:24 process [6] - 8:17, 11:10, 38:6, 46:18, 64:5, 93:9 processes [3] - 11:9, 11:18 produce [2] - 105:3, 105:4 professional [18] - 9:3, 10:22, 13:24, 14:8, 25:3, 34:5, 48:23, 49:25, 51:20, 53:13, 60:24, 62:5, 86:22, 87:10, 110:20, 111:14, 111:16, 113:6 professionally [1] - 103:12 profound [1] - 43:14 Program [2] - 20:1, 32:6 progress [1] - 12:22 promise [1] - 51:5 proof [3] - 105:10, 112:15, 169:3 proper [4] - 9:3, 9:25, 10:2, 61:14 proposed [5] - 110:8, 168:23,</p>	<p>169:10, 169:21, 172:20 prosecuted [2] - 126:23, 127:1 prove [3] - 105:17, 110:2, 112:11 provide [5] - 72:11, 110:8, 166:3, 170:9 provided [4] - 10:19, 165:25, 166:5, 168:22 provider [2] - 169:23, 170:1 provider's [1] - 73:6 providers [1] - 8:12 providing [1] - 70:6 psychological [1] - 10:11 pull [4] - 5:17, 28:2, 45:22, 101:3 punitive [1] - 41:9 purporting [1] - 63:3 purpose [23] - 10:23, 14:6, 25:2, 34:6, 49:25, 51:19, 53:12, 53:16, 60:25, 61:8, 66:21, 75:3, 77:20, 86:22, 87:11, 105:19, 108:1, 110:4, 110:16, 110:21, 166:10, 170:22, 172:9 purposes [4] - 34:20, 34:21, 36:16, 75:6 put [10] - 26:8, 36:25, 74:22, 94:4, 116:8, 122:5, 122:10, 134:20, 150:11, 165:21 Putnam [1] - 127:19 puts [1] - 55:4</p>
				Q
				<p>qualifications [1] - 71:1 qualified [2] - 12:8, 135:23 quality [2] - 96:24, 97:1 quantities [1] - 21:21 quantity [2] - 42:24, 105:13 questioned [1] - 137:1 questionnaire [10] - 18:23, 19:1, 19:2, 19:3, 19:4, 19:5, 19:6, 19:7, 20:15, 21:8 questionnaires [1] - 26:15 questions [17] -</p>

<p>43:12, 73:6, 83:17, 87:6, 103:16, 123:2, 132:8, 143:15, 145:23, 147:7, 147:9, 155:22, 156:1, 156:16, 163:14, 163:15, 163:16</p> <p>quick [3] - 38:10, 83:17, 121:21</p> <p>quickly [3] - 14:24, 37:9, 79:24</p> <p>quite [8] - 22:5, 44:22, 54:25, 101:17, 118:11, 124:14, 151:19</p> <p>quote [1] - 132:5</p>	<p>38:24, 39:1, 39:15, 39:19, 39:22, 39:24, 40:3, 40:4, 40:18, 40:20, 41:2, 41:3, 41:13, 41:16, 41:24, 42:1, 42:11, 42:13, 43:20, 43:22, 45:14, 45:23, 46:5, 46:7, 47:20, 48:2, 48:14, 48:15, 48:20, 48:21, 49:6, 49:10, 49:20, 49:22, 50:12, 50:19, 50:25, 51:5, 51:8, 51:22, 52:4, 53:2, 53:6, 54:5, 54:8, 55:18, 55:19, 56:13, 56:16, 57:16, 57:18, 58:14, 58:17, 58:23, 58:24, 59:13, 59:17, 59:23, 60:7, 60:16, 60:22, 61:17, 61:18, 62:9, 62:11, 63:6, 63:10, 63:15, 63:24, 64:7, 64:17, 64:21, 65:1, 65:4, 65:7, 65:17, 65:18, 66:1, 66:3, 66:13, 66:14, 66:23, 67:1, 67:16, 67:18, 67:23, 68:1, 68:17, 68:19, 70:19, 71:4, 71:11, 71:17, 71:23, 71:24, 72:3, 72:9, 72:17, 72:18, 73:8, 73:10, 73:13, 73:15, 73:18, 74:1, 74:5, 74:7, 74:11, 74:12, 74:17, 74:19, 75:9, 75:21, 76:12, 76:16, 78:22, 78:23, 79:9, 79:13, 79:23, 80:2, 80:12, 80:15, 81:10, 81:11, 82:12, 82:14, 83:16, 83:18, 84:6, 84:10, 84:16, 84:17, 84:21, 85:1, 85:15, 85:18, 86:2, 86:3, 86:13, 86:15, 87:6, 87:7, 87:13, 98:17, 103:18, 103:20, 103:23, 104:3, 105:11, 105:20, 106:1, 106:6, 106:12, 106:18, 106:24, 107:4, 107:24, 108:9, 108:13, 108:15, 108:17, 108:22, 109:2, 109:8, 109:16, 109:20, 110:5, 110:18, 110:24, 111:2, 111:13,</p>	<p>111:18, 113:3, 114:3, 114:25, 115:2, 154:24, 155:17, 156:18, 163:12, 163:14, 163:18, 165:13, 169:22, 170:7, 170:20, 171:7, 171:9, 171:16, 171:19, 172:11</p> <p>Ramseyer [11] - 1:18, 50:4, 50:9, 61:13, 71:10, 101:15, 105:8, 112:24, 171:6, 171:18, 172:19</p> <p>ran [2] - 43:16, 111:11</p> <p>Randall [1] - 1:18</p> <p>rate [5] - 103:3, 103:4, 135:6, 135:7, 135:15</p> <p>rather [5] - 77:13, 77:19, 98:9, 100:15, 155:15</p> <p>Ravenswood [5] - 125:12, 125:17, 125:19, 133:19</p> <p>ray [2] - 57:25, 69:24</p> <p>rays [9] - 29:1, 57:22, 69:2, 69:16, 83:7, 83:13, 89:14, 150:17, 150:20</p> <p>RB-1 [1] - 14:11</p> <p>RB-2 [3] - 15:5, 15:7, 91:16</p> <p>RB-3 [1] - 33:23</p> <p>RD-41 [2] - 63:8, 63:9</p> <p>re [1] - 2:15</p> <p>read [13] - 12:4, 24:8, 28:20, 35:15, 52:16, 68:21, 77:1, 142:9, 142:11, 142:12, 146:19, 168:14, 171:23</p> <p>reading [2] - 45:9, 45:13</p> <p>ready [8] - 3:3, 3:24, 4:3, 50:24, 51:4, 87:24, 104:6, 114:23</p> <p>real [6] - 38:10, 120:21, 121:5, 121:21, 122:25, 166:20</p> <p>realize [3] - 129:12, 141:16, 169:6</p> <p>really [20] - 11:4, 11:7, 11:12, 37:15, 64:12, 77:13, 100:13, 109:17, 123:14, 129:12, 132:4, 139:3,</p>	<p>144:16, 153:11, 157:6, 158:5, 162:5, 166:8, 166:18, 166:21</p> <p>reason [5] - 49:18, 54:22, 100:11, 111:8, 111:10</p> <p>reasonable [1] - 110:14</p> <p>reasonably [2] - 53:18, 79:20</p> <p>reasons [3] - 12:12, 35:24, 168:7</p> <p>recap [1] - 87:8</p> <p>receipt [4] - 32:21, 33:14, 33:17, 33:19</p> <p>RECEIVED [1] - 2:12</p> <p>received [13] - 4:19, 4:20, 4:21, 4:22, 25:10, 28:22, 30:23, 34:1, 55:3, 68:2, 75:18, 168:23</p> <p>receiving [2] - 62:13, 63:11</p> <p>recent [1] - 77:4</p> <p>recertification [1] - 7:5</p> <p>recess [4] - 50:21, 87:20, 87:21, 164:9</p> <p>recliner [1] - 153:11</p> <p>recognize [3] - 14:3, 18:21, 163:5</p> <p>recognized [1] - 9:15</p> <p>recollection [1] - 142:14</p> <p>record [12] - 11:15, 11:16, 16:1, 29:5, 30:19, 36:5, 37:15, 73:11, 98:10, 127:2, 148:12, 151:12</p> <p>recordkeeping [1] - 75:6</p> <p>records [21] - 12:18, 15:17, 15:21, 16:4, 17:15, 24:17, 29:7, 30:22, 40:16, 40:17, 40:25, 43:25, 59:3, 79:14, 80:4, 87:3, 95:2, 100:20, 139:20, 150:18, 151:3</p> <p>RECROSS [4] - 2:8, 2:10, 146:1, 156:17</p> <p>RECROSS-EXAMINATION [2] - 2:10, 156:17</p> <p>recurrent [1] - 102:3</p> <p>red [3] - 59:21, 59:22, 60:14</p> <p>REDIRECT [2] - 2:8, 143:18</p> <p>redirect [2] - 103:17,</p>	<p>143:16</p> <p>refer [1] - 82:2</p> <p>referral [3] - 69:3, 69:17, 69:25</p> <p>referrals [1] - 94:24</p> <p>referred [5] - 8:13, 88:21, 94:21, 129:14, 169:6</p> <p>referring [3] - 69:25, 88:19, 89:10</p> <p>reflective [1] - 13:13</p> <p>refresh [1] - 142:14</p> <p>regarding [1] - 165:14</p> <p>regardless [1] - 147:3</p> <p>regular [1] - 157:20</p> <p>regularly [1] - 23:12</p> <p>regulations [4] - 106:1, 106:2, 106:21, 108:17</p> <p>relating [1] - 4:12</p> <p>relation [1] - 10:19</p> <p>relationship [5] - 37:9, 49:5, 77:11, 99:9, 100:12</p> <p>release [3] - 29:5, 114:5, 123:23</p> <p>released [1] - 120:20</p> <p>relevance [1] - 165:15</p> <p>rely [2] - 38:1, 44:25</p> <p>remember [43] - 87:17, 117:13, 118:1, 118:13, 121:25, 122:17, 127:20, 127:21, 128:2, 128:5, 132:9, 133:5, 133:13, 133:16, 134:2, 134:15, 134:16, 134:17, 134:19, 135:16, 135:20, 138:6, 138:11, 138:12, 140:8, 140:11, 140:12, 140:14, 141:23, 141:25, 142:2, 142:3, 142:5, 143:9, 144:16, 145:19, 145:22, 146:12, 146:14, 158:2, 158:15, 168:11</p> <p>remembering [2] - 11:23, 132:7</p> <p>reminded [2] - 31:11, 79:14</p> <p>remove [1] - 104:9</p> <p>removed [1] - 169:5</p> <p>REMS [3] - 15:7, 15:13, 17:6</p> <p>repaired [1] - 68:25</p>
<p>R</p>				
<p>radiologist [2] - 58:9, 95:9</p> <p>radiology [2] - 57:19, 57:20</p> <p>rails [2] - 150:10, 150:11</p> <p>raise [6] - 5:1, 73:5, 77:5, 116:14, 147:24, 171:3</p> <p>raised [1] - 77:13</p> <p>raises [2] - 43:9, 43:12</p> <p>RAMSEYER [282] - 2:3, 2:10, 3:4, 3:7, 3:11, 4:5, 4:18, 4:23, 5:11, 5:23, 7:18, 9:14, 9:21, 13:17, 14:14, 14:21, 15:1, 15:6, 15:12, 15:16, 15:25, 16:5, 16:9, 16:10, 16:20, 16:22, 17:4, 17:9, 17:23, 18:4, 18:10, 18:14, 18:19, 18:20, 18:24, 19:8, 19:11, 19:12, 19:16, 20:5, 20:14, 20:17, 21:7, 21:11, 21:16, 21:23, 22:1, 23:6, 23:7, 23:22, 24:7, 24:18, 24:21, 25:6, 25:11, 25:14, 26:13, 26:19, 26:21, 27:25, 28:7, 28:12, 28:19, 29:9, 29:22, 29:23, 30:2, 30:3, 30:9, 30:13, 30:24, 31:5, 31:10, 31:14, 31:25, 32:15, 32:20, 32:24, 33:13, 33:17, 33:24, 34:8, 34:16, 34:25, 35:12, 35:14, 38:8, 38:14, 38:17, 38:20,</p>				

Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<p>repeat [2] - 95:6, 95:7</p> <p>repeated [2] - 95:11, 95:13</p> <p>repeatedly [3] - 46:21, 47:13, 58:20</p> <p>rephrase [2] - 98:18, 100:2</p> <p>replace [1] - 119:12</p> <p>replaced [4] - 119:11, 149:21, 149:22</p> <p>report [10] - 30:17, 42:2, 57:3, 57:12, 57:19, 57:20, 60:3, 63:13, 70:7, 84:11</p> <p>reported [6] - 17:16, 35:25, 44:3, 46:8, 58:8, 58:10</p> <p>Reporter [1] - 1:25</p> <p>reporting [3] - 39:11, 69:11, 69:14</p> <p>reports [10] - 24:10, 35:17, 35:19, 39:6, 40:21, 44:7, 54:17, 68:23, 76:3, 83:6</p> <p>represent [2] - 18:6, 113:1</p> <p>representative [1] - 13:12</p> <p>represents [1] - 55:14</p> <p>request [2] - 69:24, 104:11</p> <p>requesting [1] - 30:19</p> <p>requests [2] - 3:20, 172:17</p> <p>require [1] - 167:23</p> <p>requirements [1] - 6:18</p> <p>requires [1] - 65:16</p> <p>requiring [1] - 79:21</p> <p>research [1] - 168:13</p> <p>resembling [1] - 14:3</p> <p>residency [1] - 6:10</p> <p>resolved [1] - 167:11</p> <p>resort [2] - 156:11</p> <p>respect [11] - 91:19, 92:9, 92:15, 93:11, 97:22, 101:24, 104:21, 104:23, 105:1, 105:5, 167:18</p> <p>responded [1] - 68:4</p> <p>responsibility [3] - 8:14, 10:4, 99:6</p> <p>restricting [1] - 8:16</p> <p>restroom [3] - 121:12, 121:14, 121:15</p>	<p>restrooms [1] - 2:15</p> <p>rests [2] - 104:4, 104:5</p> <p>result [1] - 46:16</p> <p>resulted [1] - 169:13</p> <p>results [1] - 46:15</p> <p>resumed [3] - 50:22, 87:22, 164:11</p> <p>retired [1] - 159:21</p> <p>retirement [2] - 131:12, 131:16</p> <p>return [1] - 122:16</p> <p>returned [3] - 122:1, 122:2, 137:9</p> <p>review [17] - 8:14, 10:17, 10:20, 11:2, 11:3, 12:3, 12:9, 49:23, 50:15, 61:1, 67:22, 75:13, 76:5, 78:18, 88:16, 88:20, 103:5</p> <p>Review [1] - 14:22</p> <p>reviewed [19] - 13:10, 13:21, 17:15, 18:7, 29:2, 51:9, 51:18, 62:1, 64:19, 65:2, 65:3, 66:15, 66:16, 74:2, 75:19, 75:22, 87:8, 88:10, 88:18</p> <p>reviewer [2] - 18:5, 64:18</p> <p>reviewing [10] - 8:10, 8:18, 9:2, 9:11, 10:25, 13:5, 13:25, 62:4, 85:13, 98:9</p> <p>revoking [1] - 8:17</p> <p>Reynolds [2] - 2:15, 4:12</p> <p>Richmond [1] - 8:25</p> <p>rid [1] - 79:4</p> <p>ring [1] - 112:6</p> <p>risk [6] - 72:6, 76:25, 77:5, 77:14, 93:20, 93:23</p> <p>risks [3] - 93:4, 93:5, 93:23</p> <p>River [1] - 32:12</p> <p>Road [1] - 19:25</p> <p>roadway [1] - 150:9</p> <p>Robert [9] - 14:10, 22:16, 28:5, 29:19, 33:25, 63:6, 91:21, 91:22, 91:25</p> <p>rocks [1] - 150:8</p> <p>rode [1] - 158:21</p> <p>role [1] - 69:22</p> <p>room [5] - 97:24, 104:13, 118:2, 129:13, 131:4</p>	<p>rotator [1] - 68:25</p> <p>routine [2] - 97:17, 118:21</p> <p>Roxicodone [3] - 120:4, 120:14, 139:7</p> <p>rubber [1] - 30:5</p> <p>rules [1] - 112:17</p> <p>rulings [1] - 172:1</p> <p>run [2] - 45:4, 159:21</p> <p>running [2] - 142:19, 150:8</p> <p>RX [1] - 72:11</p> <p>RXD [1] - 40:5</p> <p>RXs [1] - 73:16</p>	<p>S</p> <p>safe [1] - 93:4</p> <p>sake [2] - 61:19, 83:5</p> <p>sales [1] - 140:19</p> <p>Sam [2] - 75:9, 76:12</p> <p>Sammy [1] - 77:23</p> <p>sample [3] - 13:12, 42:2, 42:3</p> <p>Samuel [1] - 1:19</p> <p>sat [2] - 7:2, 119:1</p> <p>save [1] - 54:1</p> <p>saw [7] - 52:9, 81:16, 95:2, 117:13, 128:2, 130:11, 136:11</p> <p>SB-2 [5] - 2:13, 4:8, 4:19, 51:7, 51:13</p> <p>scenario [2] - 43:14, 86:23</p> <p>Schedule [18] - 12:11, 13:1, 13:6, 28:10, 28:11, 38:15, 38:21, 40:11, 43:18, 56:19, 59:6, 84:3, 105:23, 106:13, 106:24, 108:13, 162:7</p> <p>schedule [1] - 78:20</p> <p>school [2] - 6:5, 6:8</p> <p>schools [2] - 99:22, 100:6</p> <p>scope [18] - 10:22, 13:24, 14:7, 25:3, 34:4, 48:23, 49:25, 51:20, 53:12, 60:24, 62:5, 86:22, 87:10, 108:1, 110:20, 111:14, 111:15, 113:6</p> <p>screen [19] - 44:18, 47:19, 52:12, 56:8, 57:25, 59:25, 62:23, 64:2, 64:6, 72:21, 75:16, 76:2, 76:4, 91:14, 94:4, 99:24, 100:7, 135:15, 135:20</p> <p>Screening [2] - 15:7, 15:13</p>	<p>screening [3] - 15:13, 17:6, 98:23</p> <p>screens [5] - 53:9, 53:10, 135:23, 144:19</p> <p>scroll [7] - 16:3, 34:15, 35:8, 60:1, 63:18, 66:13, 101:24</p> <p>search [2] - 4:15, 137:15</p> <p>second [7] - 18:22, 40:5, 44:6, 75:17, 77:10, 77:13, 147:19</p> <p>secure [1] - 45:3</p> <p>securing [1] - 169:1</p> <p>security [1] - 131:16</p> <p>see [88] - 11:8, 11:13, 14:12, 15:8, 16:7, 16:14, 16:18, 17:11, 18:8, 19:14, 20:7, 25:15, 26:1, 26:23, 27:1, 27:2, 29:12, 32:22, 34:11, 36:18, 40:1, 40:6, 42:2, 43:3, 44:20, 44:22, 46:8, 49:13, 49:17, 52:13, 58:5, 60:9, 63:13, 67:12, 67:13, 67:19, 70:17, 71:19, 72:1, 73:11, 74:9, 74:15, 77:8, 78:14, 80:5, 81:2, 81:4, 81:14, 81:17, 81:18, 83:12, 85:24, 94:23, 96:14, 97:3, 97:5, 97:23, 98:5, 102:10, 111:25, 113:25, 114:1, 119:21, 124:20, 124:24, 127:16, 128:15, 130:24, 131:25, 133:24, 134:8, 136:6, 137:6, 138:24, 139:1, 143:20, 149:11, 150:16, 153:24, 154:1, 154:15, 155:2, 155:9, 157:20, 158:6, 167:8, 168:17</p> <p>Seeing [2] - 69:2, 69:7</p> <p>seeing [10] - 11:6, 15:22, 15:24, 46:20, 69:19, 130:3, 131:18, 153:8, 153:9</p> <p>seeking [2] - 38:4, 115:5</p> <p>seem [2] - 49:12, 49:15</p> <p>sees [1] - 29:18</p>	<p>self [3] - 17:16, 35:25, 151:20</p> <p>self-reported [2] - 17:16, 35:25</p> <p>sell [2] - 91:2, 131:14</p> <p>selling [3] - 108:7, 129:12, 131:13</p> <p>send [2] - 60:20, 61:5</p> <p>sending [1] - 61:20</p> <p>sense [1] - 12:9</p> <p>sent [2] - 88:14, 113:22</p> <p>sentence [6] - 77:10, 77:11, 77:12, 77:13, 77:22, 169:5</p> <p>September [29] - 21:19, 25:16, 26:23, 28:4, 29:15, 30:5, 34:2, 38:13, 39:17, 55:2, 57:10, 57:11, 62:10, 62:15, 63:12, 67:14, 77:24, 78:6, 78:25, 101:13, 127:25, 132:1, 132:2, 140:2, 140:5, 149:5, 161:2, 162:2</p> <p>serious [2] - 43:12, 73:6</p> <p>serve [2] - 8:6, 100:11</p> <p>Services [1] - 32:6</p> <p>serving [1] - 75:3</p> <p>set [5] - 83:16, 112:1, 138:23, 160:6, 167:7</p> <p>sets [1] - 88:15</p> <p>seven [1] - 78:18</p> <p>several [10] - 105:3, 105:4, 122:17, 122:19, 128:20, 130:1, 131:2, 150:5, 150:13, 156:12</p> <p>severe [8] - 36:4, 37:6, 44:23, 53:19, 65:16, 72:24, 79:21, 95:4</p> <p>severity [3] - 10:14, 44:24, 44:25</p> <p>SF-7 [2] - 65:5, 65:17</p> <p>SH-1 [1] - 78:22</p> <p>SH-13 [1] - 75:10</p> <p>SH-8 [1] - 76:13</p> <p>shall [3] - 5:3, 116:16, 148:1</p> <p>shape [1] - 86:25</p> <p>sharing [1] - 45:5</p> <p>sheet [1] - 32:13</p> <p>Short [1] - 17:8</p> <p>short [2] - 17:14, 95:18</p>
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Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<p>shorter [1] - 43:16</p> <p>shoulder [2] - 68:24, 69:16</p> <p>show [21] - 14:10, 16:25, 24:17, 41:6, 46:23, 50:14, 56:24, 56:25, 57:20, 77:4, 79:2, 85:13, 91:14, 114:7, 118:21, 120:3, 124:20, 139:20, 142:7, 146:17, 166:13</p> <p>showed [3] - 42:15, 44:18, 82:5</p> <p>showing [6] - 18:7, 30:22, 72:21, 94:13, 101:7, 171:11</p> <p>shown [2] - 3:19, 71:1</p> <p>shows [16] - 24:4, 25:12, 25:16, 27:13, 44:5, 45:18, 47:4, 48:16, 49:11, 55:20, 56:21, 56:22, 58:1, 60:3, 60:11, 71:18</p> <p>shut [9] - 126:21, 127:11, 128:6, 128:9, 129:20, 129:22, 149:9, 157:25, 160:22</p> <p>shuttle [1] - 150:8</p> <p>side [4] - 5:18, 20:22, 20:24, 24:16</p> <p>sidebar [1] - 104:7</p> <p>sign [3] - 21:2, 70:15, 121:16</p> <p>signature [2] - 29:4, 76:1</p> <p>signed [4] - 2:16, 3:18, 24:24, 77:3</p> <p>significance [1] - 79:16</p> <p>significant [5] - 11:8, 29:3, 37:17, 49:3, 53:17</p> <p>signs [1] - 118:4</p> <p>similar [6] - 44:17, 50:15, 69:17, 126:10, 170:3, 170:12</p> <p>simply [16] - 13:3, 20:9, 20:11, 27:9, 27:20, 35:22, 37:1, 39:10, 46:19, 70:7, 71:8, 75:8, 98:3, 114:8, 166:12, 170:11</p> <p>single [4] - 51:12, 99:7, 100:9, 100:15</p> <p>site [1] - 34:23</p> <p>sitting [3] - 8:19, 47:15, 98:8</p> <p>situation [5] - 17:18, 17:20, 55:2, 99:7,</p>	<p>102:7</p> <p>situations [1] - 89:22</p> <p>six [9] - 75:14, 76:2, 76:7, 141:22, 142:4, 142:17, 143:7, 143:10, 146:3</p> <p>skip [2] - 64:10, 83:19</p> <p>slide [1] - 47:25</p> <p>small [2] - 20:9, 22:3</p> <p>smaller [2] - 42:20, 42:24</p> <p>smart [2] - 161:5, 161:7</p> <p>Smithers [123] - 2:15, 3:18, 10:20, 16:12, 18:7, 26:25, 27:3, 27:8, 27:14, 29:18, 30:18, 34:4, 39:3, 39:4, 40:15, 40:25, 43:24, 48:7, 49:13, 49:17, 52:9, 57:4, 61:6, 61:21, 62:4, 67:4, 68:8, 69:21, 69:24, 70:6, 74:15, 77:1, 77:3, 79:2, 79:7, 80:7, 80:22, 81:16, 82:4, 82:16, 83:11, 85:20, 86:4, 86:17, 88:16, 89:11, 90:10, 91:6, 92:8, 93:24, 94:22, 95:22, 98:14, 98:20, 100:17, 100:20, 101:8, 111:4, 113:15, 114:3, 117:9, 117:21, 118:18, 119:25, 121:23, 123:8, 123:14, 124:13, 126:8, 128:13, 129:15, 129:24, 129:25, 130:3, 130:11, 131:19, 131:25, 133:24, 134:13, 135:4, 135:11, 136:7, 136:11, 136:17, 136:20, 136:21, 137:20, 138:14, 139:1, 139:17, 140:7, 143:20, 145:4, 145:16, 146:7, 146:25, 147:5, 148:20, 148:22, 149:8, 150:16, 151:8, 152:21, 153:8, 156:5, 156:13, 156:20, 156:23, 157:1, 157:8, 157:23, 158:6, 159:1, 160:16, 160:20,</p>	<p>160:24, 161:5, 161:12, 161:21, 165:24, 167:17</p> <p>SMITHERS [1] - 1:8</p> <p>Smithers's [13] - 44:6, 59:3, 76:1, 86:17, 91:1, 93:25, 95:14, 98:11, 125:22, 130:14, 137:16, 139:21, 140:10</p> <p>SOAPP [3] - 18:21, 18:23, 19:9</p> <p>SOAPP-R [3] - 18:21, 18:23, 19:9</p> <p>social [1] - 131:16</p> <p>society [1] - 12:1</p> <p>sold [1] - 146:3</p> <p>solemnly [3] - 5:2, 116:15, 147:25</p> <p>someone [8] - 44:22, 58:5, 60:14, 70:17, 77:18, 85:2, 96:19, 154:8</p> <p>someplace [1] - 145:13</p> <p>sometime [1] - 69:15</p> <p>sometimes [6] - 56:21, 90:1, 90:2, 94:21, 131:1, 136:8</p> <p>somewhere [3] - 8:24, 97:5, 133:10</p> <p>son [1] - 154:7</p> <p>sons [1] - 154:7</p> <p>sorry [31] - 18:11, 19:22, 26:6, 43:20, 45:21, 47:1, 47:25, 49:8, 53:3, 53:4, 54:21, 59:15, 60:1, 60:6, 60:18, 73:5, 75:23, 78:10, 92:16, 95:15, 98:4, 99:25, 100:25, 104:19, 106:5, 134:21, 147:13, 151:5, 153:15, 154:6, 155:24</p> <p>sort [4] - 34:17, 44:19, 89:17, 113:14</p> <p>sound [4] - 41:10, 117:15, 138:5, 149:5</p> <p>Sounds [1] - 86:7</p> <p>sounds [3] - 41:9, 132:12, 149:7</p> <p>space [1] - 36:21</p> <p>speaking [2] - 44:14, 66:22</p> <p>special [3] - 6:15, 106:12, 106:14</p> <p>specialist [2] - 29:2, 95:9</p> <p>specific [1] - 99:23</p>	<p>specifically [2] - 30:20, 107:7</p> <p>spectrum [1] - 10:10</p> <p>speculation [4] - 13:15, 61:11, 70:24, 86:10</p> <p>spell [2] - 117:5, 148:14</p> <p>spend [3] - 97:7, 97:10, 97:13</p> <p>spine [4] - 58:3, 58:4, 58:6, 58:11</p> <p>spoken [2] - 88:23, 164:15</p> <p>spondylosis [1] - 57:14</p> <p>spot [1] - 111:12</p> <p>staff [1] - 97:4</p> <p>stamp [2] - 39:17, 141:13</p> <p>stamps [2] - 30:5, 141:15</p> <p>stand [6] - 4:25, 5:6, 105:3, 105:4, 119:21, 148:4</p> <p>standard [5] - 22:23, 75:4, 90:15, 91:4, 107:21</p> <p>start [9] - 14:10, 14:11, 20:12, 34:10, 49:2, 120:6, 120:8, 149:25, 161:16</p> <p>started [10] - 31:2, 120:6, 126:18, 128:18, 128:19, 130:2, 132:3, 133:2, 150:2</p> <p>starting [2] - 83:21, 146:19</p> <p>starts [1] - 10:3</p> <p>state [8] - 8:12, 9:12, 49:17, 73:5, 102:1, 117:3, 128:11, 148:12</p> <p>statement [6] - 3:18, 79:5, 89:4, 90:6, 99:20, 155:20</p> <p>states [1] - 76:21</p> <p>STATES [2] - 1:2, 1:5</p> <p>States [4] - 1:18, 1:20, 107:1, 126:23</p> <p>status [1] - 113:21</p> <p>statute [1] - 171:23</p> <p>stay [3] - 44:15, 125:25, 130:25</p> <p>stayed [1] - 129:13</p> <p>staying [4] - 44:7, 125:12, 128:16, 140:18</p> <p>steel [1] - 150:10</p> <p>step [1] - 163:20</p>	<p>Stephen [1] - 65:4</p> <p>stepping [1] - 123:16</p> <p>Steve [4] - 2:13, 4:9, 51:7, 51:19</p> <p>Steven [1] - 1:18</p> <p>sticky [5] - 31:10, 33:20, 41:4, 72:7, 73:13</p> <p>still [10] - 36:5, 42:20, 46:11, 126:19, 127:9, 127:12, 130:6, 136:10, 139:14, 141:13</p> <p>stomach [3] - 121:5, 123:23, 131:14</p> <p>stone [4] - 79:14, 79:18, 79:19, 101:19</p> <p>stones [3] - 101:23, 102:6, 102:7</p> <p>stop [6] - 35:10, 38:9, 38:10, 38:19, 41:15, 139:16</p> <p>stopped [3] - 127:16, 127:17, 140:6</p> <p>store [4] - 153:5, 154:4, 157:9, 159:21</p> <p>straightforward [1] - 77:13</p> <p>strange [1] - 110:1</p> <p>street [1] - 108:8</p> <p>Street [1] - 1:20</p> <p>strength [1] - 22:9</p> <p>strengths [1] - 22:10</p> <p>stretch [1] - 167:11</p> <p>strictly [1] - 14:14</p> <p>strike [1] - 33:8</p> <p>strong [4] - 12:15, 12:23, 81:25, 120:15</p> <p>stronger [1] - 123:17</p> <p>struggles [1] - 44:22</p> <p>struggling [7] - 36:4, 36:14, 37:2, 37:5, 37:7, 37:15, 82:1</p> <p>students [1] - 99:13</p> <p>studies [1] - 29:2</p> <p>study [1] - 7:2</p> <p>stuff [15] - 66:17, 89:14, 90:4, 99:24, 123:17, 124:9, 125:14, 129:11, 135:6, 135:19, 144:15, 144:23, 145:4, 152:6, 156:6</p> <p>subjective [4] - 27:21, 89:4, 89:5, 102:15</p> <p>subjectively [1] - 17:20</p> <p>submitted [1] - 21:18</p> <p>Suboxone [4] - 44:7,</p>
--	---	---	--	---

<p>44:17, 68:3, 68:5 subpoenaed [1] - 164:22 subsequent [2] - 81:21, 154:15 substance [16] - 9:23, 19:17, 19:24, 40:6, 40:12, 48:10, 55:25, 84:19, 106:11, 107:14, 107:17, 107:22, 155:2, 169:24, 170:1, 170:14 substances [45] - 9:17, 12:11, 12:16, 12:19, 13:6, 20:8, 27:7, 27:16, 31:3, 31:23, 39:7, 39:8, 43:5, 43:18, 51:16, 56:19, 57:1, 58:20, 65:14, 70:10, 70:12, 70:13, 70:18, 75:5, 79:6, 83:10, 84:3, 84:4, 105:14, 105:21, 105:22, 105:24, 106:13, 106:25, 107:5, 107:20, 108:14, 108:15, 126:10, 126:11, 127:2, 127:5, 127:14, 128:10, 169:12 Substances [2] - 20:1, 32:6 substantially [1] - 26:11 successful [1] - 150:21 sufficiency [1] - 112:14 sufficient [1] - 112:22 suicide [1] - 155:13 Suite [1] - 1:20 sulfate [2] - 55:3, 67:15 summary [5] - 28:2, 28:4, 29:13, 29:17, 38:12 summonsed [1] - 166:16 supplement [3] - 89:18, 107:10, 109:22 supplements [1] - 112:4 supply [2] - 43:15, 169:19 support [1] - 10:11 suppose [3] - 93:17, 93:19, 95:2 supposed [4] - 31:18, 113:16, 114:4,</p>	<p>164:18 supposedly [1] - 136:19 surgeries [6] - 92:21, 93:4, 130:5, 156:9, 156:10, 156:12 surgery [15] - 6:9, 10:12, 92:18, 92:19, 93:5, 93:7, 93:13, 93:16, 93:18, 93:21, 130:5, 132:1, 139:15, 139:19, 140:2 surprised [2] - 90:20, 91:4 surrounding [1] - 11:24 survey [1] - 32:2 suspended [3] - 50:22, 87:22, 164:11 swear [3] - 5:2, 116:15, 147:25 swing [1] - 124:20 sworn [5] - 4:25, 5:9, 116:14, 116:24, 148:9 symptom [1] - 39:13 symptoms [6] - 17:16, 20:11, 27:10, 69:6, 69:12, 69:19 system [4] - 47:10, 47:13, 75:14, 76:5 Systems [1] - 14:22</p>	<p>testified [11] - 5:9, 54:3, 64:12, 103:7, 103:10, 116:24, 123:25, 125:24, 136:19, 148:9, 168:25 testify [7] - 113:24, 114:14, 115:11, 118:17, 150:25, 155:21, 167:17 testifying [8] - 103:9, 113:16, 127:20, 128:2, 133:13, 134:17, 141:25, 146:11 testimony [18] - 5:2, 71:7, 71:8, 102:5, 103:3, 108:3, 110:25, 111:15, 113:5, 115:5, 116:9, 116:15, 137:18, 142:8, 146:18, 147:25, 166:11 testing [10] - 29:6, 40:5, 70:1, 89:14, 90:4, 95:23, 98:24, 99:24, 121:15, 152:11 tests [3] - 76:6, 85:5, 152:14 Texas [2] - 6:12, 6:13 text [4] - 4:11, 85:16, 85:20, 113:22 Text [1] - 2:14 THE [174] - 1:2, 1:3, 2:13, 3:2, 3:6, 3:10, 3:12, 3:16, 4:2, 4:17, 4:24, 5:1, 5:5, 5:6, 5:17, 5:21, 7:14, 7:16, 7:17, 9:18, 9:20, 13:16, 21:10, 24:20, 25:9, 26:18, 28:17, 30:12, 31:9, 32:14, 35:11, 50:4, 50:9, 50:18, 50:20, 50:24, 51:1, 51:4, 61:12, 70:22, 70:25, 71:6, 75:15, 86:8, 86:11, 87:14, 87:19, 87:24, 88:1, 88:3, 103:17, 103:19, 103:21, 103:22, 104:1, 104:2, 104:5, 104:9, 104:12, 104:15, 104:18, 105:8, 105:15, 105:25, 106:5, 106:10, 106:16, 106:20, 107:1, 107:11, 108:6, 108:12, 108:14, 108:16, 108:20, 108:25, 109:5,</p>	<p>109:14, 109:19, 109:25, 110:7, 110:23, 111:1, 111:9, 111:17, 111:19, 112:13, 113:9, 113:25, 114:6, 114:11, 114:18, 114:22, 115:1, 115:8, 115:13, 115:15, 115:18, 115:21, 116:2, 116:4, 116:8, 116:15, 116:18, 116:19, 116:21, 118:19, 123:3, 139:10, 139:12, 143:16, 145:24, 147:8, 147:11, 147:13, 147:15, 147:21, 147:22, 147:23, 148:3, 148:4, 148:5, 150:24, 151:1, 151:2, 151:5, 151:23, 152:1, 154:17, 155:1, 155:4, 155:6, 155:8, 155:18, 155:19, 155:23, 155:25, 156:3, 163:13, 163:15, 163:17, 163:20, 164:1, 164:5, 164:9, 164:13, 165:1, 165:6, 165:9, 165:11, 165:23, 166:3, 166:10, 166:15, 166:23, 167:1, 167:3, 167:21, 168:2, 168:4, 168:19, 170:5, 170:11, 170:17, 170:25, 171:5, 171:8, 171:15, 171:17, 171:21, 171:25, 172:4, 172:7, 172:13 themselves [2] - 11:21, 17:17 theory [1] - 110:10 therapies [1] - 156:5 Therapy [1] - 74:8 therapy [6] - 10:11, 30:4, 39:17, 65:19, 96:2, 156:9 therefore [1] - 46:20 they've [1] - 95:5 thinking [2] - 140:13, 154:6 third [1] - 138:11 thorough [1] - 10:3 thoughtful [1] - 64:5 thousands [1] - 11:22 threatened [1] - 155:13</p>	<p>three [23] - 23:11, 23:12, 42:9, 43:9, 54:10, 54:12, 63:5, 73:2, 82:7, 102:2, 102:10, 121:2, 129:25, 130:5, 134:20, 137:23, 141:5, 142:22, 158:16, 158:17, 158:19, 163:10 throughout [2] - 37:15, 113:19 throw [1] - 150:9 Thursday [1] - 4:13 time-limited [1] - 79:19 Timmy [1] - 59:23 tinker [1] - 153:6 titled [2] - 91:17, 101:8 titrated [1] - 78:20 titrating [1] - 78:6 titration [2] - 48:19, 78:24 today [11] - 52:17, 88:8, 102:14, 103:2, 113:15, 113:24, 114:1, 130:4, 139:14, 164:20, 170:7 together [5] - 107:9, 154:11, 154:13, 161:23, 161:25 toilet [1] - 138:25 tolerable [2] - 153:1, 153:2 tolerance [2] - 35:20, 36:2 tolerate [1] - 124:11 Tolerates [1] - 20:18 tolerates [1] - 35:16 tolerating [3] - 20:22, 24:10, 124:9 Tolliver [2] - 158:23, 162:25 tomorrow [7] - 113:17, 164:20, 167:9, 167:24, 167:25, 168:7, 168:17 tonight [2] - 164:18, 165:4 took [15] - 42:10, 44:15, 54:10, 98:14, 108:23, 118:4, 124:3, 129:14, 138:25, 146:15, 150:18, 160:9, 160:13, 162:23 Tool [4] - 26:22, 39:2, 91:18, 95:21 tool [2] - 9:23, 10:9 tools [2] - 9:25, 10:9</p>
--	---	--	--	---

<p>top [7] - 18:17, 23:8, 48:3, 76:17, 150:10, 150:11</p> <p>total [2] - 22:12, 148:19</p> <p>totality [1] - 13:25</p> <p>touch [3] - 164:8, 164:16, 166:1</p> <p>toward [1] - 113:7</p> <p>Toyota [1] - 125:4</p> <p>track [5] - 12:12, 80:16, 80:18, 81:23, 122:6</p> <p>tracking [1] - 81:13</p> <p>trafficking [1] - 81:23</p> <p>trailer [1] - 140:20</p> <p>training [1] - 93:25</p> <p>Tramadol [1] - 76:3</p> <p>transcribed [1] - 1:25</p> <p>TRANSCRIPT [1] - 1:11</p> <p>Transcription [1] - 1:25</p> <p>transfer [1] - 12:3</p> <p>transmission [1] - 30:17</p> <p>travel [2] - 8:25, 49:17</p> <p>traveling [1] - 49:12</p> <p>treat [3] - 38:5, 40:12, 102:17</p> <p>treated [3] - 37:19, 37:20, 123:12</p> <p>treating [5] - 10:5, 10:15, 11:22, 24:12, 98:1</p> <p>treatment [22] - 11:11, 14:15, 17:22, 18:25, 19:17, 27:24, 28:24, 29:1, 29:7, 30:19, 32:11, 37:12, 53:21, 65:21, 68:2, 68:3, 68:5, 68:6, 82:3, 93:15, 96:22</p> <p>Treatment [2] - 32:12, 90:10</p> <p>treatments [2] - 96:10, 96:16</p> <p>trial [2] - 164:23, 165:19</p> <p>TRIAL [1] - 1:11</p> <p>TRICARE [1] - 145:20</p> <p>tried [7] - 79:2, 110:21, 113:19, 113:20, 121:1, 138:18</p> <p>trip [1] - 44:15</p> <p>trips [1] - 150:12</p>	<p>trouble [5] - 119:24, 123:21, 124:9, 132:7, 165:3</p> <p>true [10] - 45:13, 94:25, 95:2, 95:5, 95:7, 97:22, 99:21, 100:5, 139:23</p> <p>truth [11] - 5:3, 5:4, 45:11, 116:16, 116:17, 118:21, 148:1, 148:2</p> <p>truthful [1] - 90:17</p> <p>try [16] - 35:7, 96:19, 96:22, 98:14, 120:22, 122:24, 124:20, 138:1, 138:2, 139:2, 144:5, 144:7, 145:7, 145:13, 145:20, 164:6</p> <p>trying [14] - 14:23, 18:1, 41:6, 79:23, 83:5, 123:21, 124:10, 139:3, 144:16, 145:5, 164:7, 167:1, 167:11</p> <p>twenty [1] - 150:4</p> <p>twenty-four [1] - 150:4</p> <p>twice [3] - 54:10, 133:14, 134:6</p> <p>two [26] - 4:6, 8:24, 22:18, 43:6, 43:7, 106:19, 113:14, 118:12, 121:2, 129:24, 129:25, 130:6, 132:25, 138:11, 142:22, 143:6, 148:23, 149:3, 156:19, 158:15, 158:16, 158:18, 165:25, 166:6, 171:7</p> <p>type [4] - 31:21, 36:15, 37:9, 158:4</p> <p>types [1] - 10:8</p> <p>typical [1] - 77:9</p> <p>typically [3] - 8:11, 93:9, 111:25</p>	<p>undergraduate [1] - 6:7</p> <p>underlying [4] - 10:13, 38:5, 41:11, 45:7</p> <p>UNITED [2] - 1:2, 1:5</p> <p>United [4] - 1:18, 1:20, 107:1, 126:23</p> <p>University [2] - 6:8, 6:10</p> <p>unless [4] - 115:15, 133:2, 136:8, 154:24</p> <p>unrelated [1] - 61:24</p> <p>unsigned [1] - 32:17</p> <p>unspecified [1] - 34:23</p> <p>unsure [2] - 75:14, 89:12</p> <p>unusual [2] - 49:15, 58:5</p> <p>up [59] - 11:10, 12:2, 12:5, 17:22, 18:16, 22:5, 22:13, 25:24, 28:3, 28:16, 28:20, 29:8, 31:7, 34:11, 34:15, 35:13, 41:24, 42:12, 43:20, 44:18, 45:17, 45:22, 46:6, 47:14, 48:3, 49:8, 58:18, 65:6, 70:3, 73:14, 82:18, 87:20, 88:14, 94:4, 101:3, 112:3, 114:7, 114:12, 116:6, 116:10, 116:19, 119:21, 124:18, 125:5, 132:3, 136:2, 136:3, 145:9, 149:19, 149:22, 150:10, 156:22, 156:25, 158:1, 158:5, 160:6, 172:22</p> <p>Urgent [2] - 14:12, 33:15</p> <p>urinating [1] - 4:16</p> <p>urine [18] - 42:3, 42:6, 44:18, 47:19, 53:9, 53:10, 56:7, 59:25, 64:2, 72:21, 72:24, 76:2, 76:4, 76:18, 98:24, 135:15, 135:20, 135:22</p> <p>useful [2] - 64:12, 66:21</p> <p>uses [3] - 40:14, 170:21</p>	<p>76:21</p> <p>value [1] - 43:11</p> <p>variability [1] - 89:9</p> <p>variety [1] - 92:7</p> <p>various [3] - 16:3, 89:13, 168:7</p> <p>verdict [5] - 169:10, 169:15, 169:18, 172:4, 172:13</p> <p>verification [1] - 30:17</p> <p>versus [4] - 23:1, 36:23, 89:8, 151:14</p> <p>view [4] - 61:7, 88:20, 111:23, 171:14</p> <p>viewed [1] - 85:3</p> <p>violation [2] - 107:3, 107:16</p> <p>VIRGINIA [1] - 1:3</p> <p>Virginia [16] - 5:25, 6:7, 6:8, 7:25, 8:8, 8:13, 9:12, 19:25, 49:11, 117:8, 124:16, 126:24, 128:11, 148:17, 157:14, 157:18</p> <p>visit [23] - 25:20, 25:21, 25:25, 62:21, 67:11, 76:10, 76:22, 76:24, 117:20, 118:9, 122:9, 130:13, 131:4, 131:21, 131:22, 132:11, 133:25, 137:7, 151:8, 151:17, 158:4, 159:12, 161:23</p> <p>visits [4] - 61:6, 61:21, 97:17, 125:25</p> <p>vital [1] - 118:4</p> <p>vitamins [3] - 12:15, 112:3, 112:10</p> <p>Vogt [1] - 124:18</p> <p>vomiting [1] - 24:12</p> <p>vs [1] - 1:7</p>	<p>warning [1] - 52:7</p> <p>warrant [3] - 4:15, 129:4, 137:15</p> <p>watch [1] - 168:14</p> <p>water [1] - 5:12</p> <p>Wayne [3] - 158:23, 159:10, 162:25</p> <p>ways [5] - 36:25, 38:4, 124:14, 150:6, 150:14</p> <p>weaning [1] - 120:8</p> <p>wearing [1] - 141:19</p> <p>weather [1] - 54:18</p> <p>week [5] - 158:4, 164:24, 166:6</p> <p>weekend [2] - 4:3, 113:20</p> <p>weeks [3] - 78:21, 166:6, 167:8</p> <p>Wendell [14] - 121:11, 121:17, 134:8, 134:12, 135:3, 135:7, 135:12, 135:17, 135:19, 135:22, 136:17, 138:24, 138:25, 145:1</p> <p>Wendell's [1] - 137:10</p> <p>West [8] - 1:20, 49:11, 117:8, 126:24, 128:11, 148:17, 157:14, 157:18</p> <p>Western [1] - 6:10</p> <p>WESTERN [1] - 1:3</p> <p>wheelchair [3] - 116:6, 130:4, 147:14</p> <p>whole [8] - 5:3, 13:13, 49:4, 65:23, 116:17, 148:1, 149:24, 150:13</p> <p>wife [1] - 86:17</p> <p>Williams [34] - 1:22, 1:23, 3:12, 60:19, 61:5, 61:20, 72:10, 72:13, 83:19, 83:20, 85:20, 86:7, 86:16, 86:19, 88:4, 94:7, 104:6, 104:15, 111:19, 113:12, 114:14, 115:3, 115:8, 115:24, 132:8, 155:22, 163:22, 164:13, 170:9, 170:11, 171:1, 171:21, 172:2, 172:4</p> <p>WILLIAMS [79] - 2:4, 2:7, 2:8, 2:9, 3:13, 9:19, 13:14, 61:10, 70:21, 70:23, 86:9, 87:25, 88:5, 88:7,</p>
				<p>W</p> <p>wait [6] - 49:8, 54:2, 76:7, 131:2, 134:10, 151:2</p> <p>waiting [1] - 167:18</p> <p>walk [2] - 118:2, 134:10</p> <p>walking [1] - 130:12</p> <p>walks [1] - 102:15</p> <p>Wallingford [1] - 65:8</p> <p>Walmart [7] - 102:4, 102:10, 140:22, 141:10, 141:15, 142:24, 146:24</p>
	<p>U</p> <p>U.S [1] - 11:6</p> <p>UDT [3] - 40:22, 75:13, 76:17</p> <p>ultimate [1] - 73:6</p> <p>ultimately [3] - 12:21, 13:10, 47:17</p> <p>unable [2] - 52:18, 153:11</p> <p>unclear [1] - 165:20</p> <p>under [8] - 43:17, 91:25, 108:17, 110:2, 112:16, 112:17, 118:20, 169:25</p>	<p>V</p> <p>VA [2] - 1:21, 1:24</p> <p>vacuum [1] - 12:1</p> <p>Valium [2] - 76:20,</p>		

Donna Prather, CCR, RPR, CCP, CCB

Official Court Reporter for the U.S. District Court Western District of Virginia

<p>92:12, 92:13, 94:4, 94:6, 98:18, 98:19, 103:14, 104:7, 104:11, 104:16, 104:19, 111:21, 113:13, 114:8, 114:15, 114:20, 114:24, 115:9, 115:14, 115:17, 115:25, 116:3, 116:5, 117:2, 118:22, 123:1, 143:17, 143:19, 145:23, 147:9, 147:17, 148:6, 148:11, 151:6, 152:3, 154:18, 155:5, 155:10, 155:24, 156:2, 156:4, 156:16, 163:16, 163:19, 163:23, 164:6, 164:10, 164:15, 165:2, 165:8, 165:10, 165:24, 166:5, 166:12, 166:17, 166:25, 167:2, 167:18, 168:1, 170:15, 170:18, 171:3, 171:22, 172:3, 172:6 Williams's [1] - 85:16 wire [1] - 141:19 wired [1] - 141:16 wires [1] - 86:17 wish [1] - 38:3 with [1] - 44:10 withdraw [1] - 3:20 WITNESS [25] - 5:5, 5:21, 7:16, 21:10, 26:18, 28:17, 30:12, 31:9, 32:14, 35:11, 75:15, 103:22, 116:18, 116:21, 139:12, 147:13, 147:22, 148:3, 151:1, 151:5, 152:1, 155:4, 155:8, 155:18, 155:23 witness [23] - 4:4, 5:8, 24:19, 61:14, 71:1, 103:19, 113:22, 114:6, 114:7, 114:9, 116:2, 116:13, 116:23, 118:17, 147:11, 147:12, 147:16, 148:8, 156:1, 163:17, 163:24, 168:25 witness [1] - 169:2 WITNESSES [2] - 2:2, 2:5</p>	<p>witnesses [16] - 105:3, 105:4, 113:15, 114:2, 114:4, 114:19, 115:2, 164:14, 167:7, 167:9, 167:12, 167:19, 167:24, 168:5, 168:6, 169:2 woman [1] - 137:7 wonder [1] - 5:17 words [5] - 89:6, 92:17, 94:13, 95:9, 96:1 Workman [4] - 125:14, 128:21, 129:17, 140:19 World [2] - 88:24, 89:1 worry [1] - 124:22 worse [2] - 35:25, 69:6 worsened [3] - 54:19, 54:21, 69:1 worsening [3] - 69:8, 69:19, 70:1 worth [1] - 122:13 wrist [1] - 80:17 write [9] - 109:3, 109:9, 121:13, 127:4, 127:14, 128:4, 128:12, 138:22, 160:18 writes [1] - 29:18 writing [8] - 27:8, 31:2, 31:16, 107:22, 111:10, 127:9, 128:10, 170:13 written [13] - 7:3, 14:5, 21:19, 25:17, 30:7, 30:8, 70:14, 85:2, 99:14, 126:9, 136:3, 146:6, 147:4 wrote [9] - 27:3, 77:3, 83:11, 108:25, 136:5, 138:14, 138:17, 143:9, 161:2 WW [3] - 75:22, 75:23, 76:25 Wytheville [7] - 60:4, 67:11, 129:21, 132:20, 149:13, 158:1, 162:18</p> <p>X</p> <p>X-ray [2] - 57:25, 69:24 X-rays [9] - 29:1, 57:22, 69:2, 69:16, 83:7, 83:13, 89:14, 150:17, 150:20</p>	<p>Y</p> <p>year [6] - 6:5, 7:2, 11:22, 57:6, 88:14, 149:20 years [17] - 8:5, 8:18, 8:22, 9:11, 16:14, 65:10, 102:2, 102:10, 130:6, 131:13, 139:8, 143:1, 148:19, 148:23, 149:3, 150:4 yoga [1] - 144:3 York [2] - 6:11 you-all [1] - 118:14 young [1] - 65:15 younger [1] - 99:14 yourself [4] - 5:15, 142:9, 142:12, 146:19</p> <p>Z</p> <p>Zachary [1] - 1:19 Zanaflex [6] - 21:9, 26:17, 28:9, 55:22, 67:6, 71:19 zero [1] - 58:6 Ziploc [1] - 122:5 zoom [6] - 21:4, 24:8, 28:6, 28:16, 40:19, 41:24</p>
---	---	--